Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1996

URVASHI B. PATEL, an individual,

Petitioner,

v.

SCOTLAND MEMORIAL HOSPITAL, a North Carolina Corporation, W. Harley Davidson, an individual and Gregory C. Wood, an individual,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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160 pp

QUESTIONS PRESENTED FOR REVIEW

1. Certiorari should be granted to resolve the conflict among the circuits, and between the Fourth Circuit and this Court, regarding whether there is an unqualified, complete exemption from federal antitrust law for any "staffing decision by a single hospital as to a single practitioner," which reduces that practitioner's ability to compete in the relevant market.

2. Certiorari should be granted to resolve the conflict among the circuits regarding whether the Intracorporate Immunity Doctrine, announced by this Court in *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 104 S. Ct. 2731, 81 L.Ed.2d 628 (1984), precludes individual, non-employee, non-agent members of a hospital's independent medical staff from having the capacity to enter into a conspiracy, within the meaning of Sherman Act §1, 15 U.S.C. §1 (1990), with a hospital where they have privileges, absent an economic motive on their part.

3. Certiorari should be granted to resolve the conflict among the circuits, and between the Fourth Circuit and this Court, regarding whether a Plaintiff in a Sherman Act §1 case must affirmatively allege that a vertical restraint, which has the effect of reducing the competitiveness of a Plaintiff in offering her services to the public, also has the specific effect of raising prices to consumers, in order to survive a F.R.C.P. Rule 12(b)(6) motion to dismiss.

4. Certiorari should be granted to resolve the conflict among the Fourth Circuit and the Courts of the State of North Carolina concerning the circumstances in which

QUESTIONS PRESENTED FOR REVIEW – Continued

it is appropriate to grant a Motion to Dismiss, pursuant to F.R.C.P. Rule 12(b)(6), regarding a Plaintiff's claim for tortious interference with contract and intentional infliction of severe emotional distress.

PARTIES TO THE PROCEEDING

Petitioner, Urvashi B. Patel, M.D., is a resident of Tulsa, Oklahoma. She was the Plaintiff in the lower court proceedings of this case and was the Appellant before the United States Court of Appeals for the Fourth Circuit.

Respondent, Scotland Memorial Hospital, is a not-for-profit community-owned corporation, existing by virtue of the laws of the State of North Carolina. Respondent, Scotland Memorial Hospital does business in Scotland County North Carolina.

Respondent, W. Harley Davidson, an individual resident of South Carolina, was a physician who had staff privileges at Scotland Memorial Hospital, but who was neither its employee nor its agent.

Respondent, Gregory C. Wood an individual resident of North Carolina, was an employee of Scotland Memorial Hospital with the position of Administrator thereof.

Each Respondent was a Defendant in the lower court proceedings and each was an Appellee before the United States Court of Appeals for the Fourth Circuit.

There are no other parties to this action.

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PETITION FOR WRIT OF CERTIORARI

Dr. Urvashi B. Patel petitions this Court for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit, Case No. 95-2704 (United States Court of Appeals for the Fourth Circuit, July 10, 1996, rehearing denied, August 13, 1996).

OPINIONS BELOW

On July 10, 1996, The United States Court of Appeals for the Fourth Circuit issued its opinion (Pet. App. at 1a-11a) affirming the decision of the District Court. That opinion was unpublished, as were the opinions of the District Court (Pet App. at 12a to 36a).

STATEMENT OF JURISDICTION

The opinion, which constitutes its judgment, of the United States Court of Appeals for the Fourth Circuit, was entered on July 10, 1996. On July 23, 1996, Petitioner Urvashi B. Patel timely filed her Petition for Rehearing and Suggestion for Rehearing In Banc (Pet. App. at 39a to 58a), which, by Order entered August 13, 1996 (Pet. App. at 37a to 38a), the Fourth Circuit denied. The Certiorari jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTE INVOLVED

15 U.S.C. §1 (1990) provides:

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade

> or commerce among the several States, or with foreign nations, is declared to be illegal . . .

STATEMENT OF THE CASE

This case concerns the applicability of Section 1 of the Sherman Antitrust Act, 15 U.S.C. §1 (1990) ("Sherman Act §1") to police restraints of trade imposed on the medical practice of Dr. Urvashi B. Patel ("Dr. Patel"), an independent, hospital-based physician – an anesthesiologist – which effectively eliminated her ability to serve her existing clients and devastated her business, which restraints were imposed on her by the concerted action of the hospital where she conducted her independent practice, its administrator and an independent member of the hospital's medical staff acting outside of any official capacity (collectively, the "Defendants"). The actions of the Defendants occurred outside of peer review and against the expressed desires of other physicians at the hospital.

Both lower courts ruled that there was no set of circumstances under which such actions by the Defendants could give rise to a valid claim by Dr. Patel and dismissed Dr. Patel's Complaint against them under Rule 12(b)(6) of the Federal Rules of Civil procedure ("F.R.C.P."). The lower courts also dismissed Dr. Patel's claims arising from the same facts under North Carolina state Antitrust and tort law – for the torts of intentional infliction of severe emotional distress and of tortious interference with contract. Unable to find any North Carolina judicial authority supporting such dismissal, the District Court simply misdescribed the facts contained in

Dr. Patel's pleadings. Although this clear error was brought to the attention of the Fourth Circuit by Petitioner in her appeal, the Fourth Circuit summarily affirmed the District Court's dismissal of Dr. Patel's state law claims without discussion.

Because this case arises on the granting of a Motion to Dismiss, the facts are necessarily those contained in Dr. Patel's pleadings. Although the District Court refused Dr. Patel's application to submit her final amended pleading – Plaintiff's Second Amended Complaint – and the Court of Appeals affirmed such ruling, such refusal was predicated on the lower courts' determination that the minor amendments contained in such Second Amended Complaint would have had no impact on their judgment. Since such is not a valid basis for denying a petition to amend a complaint, *Foman v. Davis*, 317 US. 178, 83 S.Ct. 227, 9 L.Ed.2d 222 (1962), Dr. Patel has included the following summary of the facts contained therein (which are substantially the same as those contained in her earlier pleadings as well):

A. Facts

Beginning in October, 1988, and continuing until March, 1991, Dr. Patel, a member of the medical staff of Respondent Scotland Memorial Hospital ("SMH"), had contracts with both SMH and with various surgeons who practiced there, to provide 24-hour per-day, 365 days per-year anesthesiological services on behalf of such hospital and for such surgeons. Her contractual commitments to the surgeons existed apart from any contract she had with SMH. Because it was common for several surgeons to operate on patients at the same time, in order to fulfill

her contractual commitments to them, Dr. Patel required the services of Certified Registered Nurse Anesthetists ("CRNAs") to assist her at such times. Dr. Patel's medical practice at SMH grew to reach a level of $750,000 per year by March 27, 1991. Defendant SMH operated the only hospital in the county in which it was located; the nearest hospital with facilities even roughly comparable was 32 miles away.

From October, 1988, through February, 1990, Respondent W. Harley Davidson ("WHD") engaged in a number of activities calculated to damage Dr. Patel's business relationships with SMH and the surgeons who practiced there, including making numerous misrepresentations concerning her professional performance to various boards and committees of SMH and otherwise defaming her professional performance. WHD was Chief of Staff at SMH during much of that period. During the fall of 1990, at a time when he was Chief of Staff, WHD was instrumental in obtaining the promotion of Defendant Gregory C. Wood ("GCW") to the position of Chief Administrator of SMH, a position for which GCW was under-qualified. It was WHD's intent in obtaining such promotion for GCW to be able to exert unusual influence over him in the future.

Sometime prior to March 27, 1991, Defendants SMH, GCW and WHD, acting in his own behalf and not in his capacity as former Chief of Staff at SMH, entered into a combination or conspiracy wilfully to destroy Dr. Patel's medical practice and business by interfering with her contracts with the various surgeons who performed surgery at SMH to provide them with anesthesiology services and thereby to create an unreasonable restraint of

trade, knowing full well that such would have a substantial affect on interstate commerce, by preventing patients and surgeons at SMH and in its relevant market – Scotland County and surrounding areas – from being able to utilize her services. A substantial portion of the patients Dr. Patel and SMH serviced were from out-of-state. Defendants did this in the following manner:

On March 27, 1991, with full knowledge of the prior actions of WHD consisting of his attempts to damage Dr. Patel's business, at a time when Dr. Patel continued to have full privileges at SMH, the Defendants jointly compelled all CRNAs to refuse to communicate with her from that day forward and forbade them from performing any services on behalf of her or her patients, even though they were permitted to perform any such services requested, including administering anesthesia, by any other doctor at SMH, including those with only provisional privileges and including those who were not even anesthesiologists. Under the rules of SMH, Dr. Patel was prevented from substituting CRNAs or additional anesthesiologists in her own employ to assist her, but rather could only (if allowed) either use SMH's CRNA employees or none at all.

In short, from that time forward, due to the actions of Defendants, any doctor working at SMH, whether or not an anesthesiologist, *other than Dr. Patel*, was permitted to supervise SMH's CRNAs and to utilize them in any manner they saw fit. This was done notwithstanding the facts that (a) Defendants knew Dr. Patel, a trained anesthesiologist, was fully competent to supervise all such CRNAs, (b) there would be no conflict with any other persons in Dr. Patel's using such CRNAs, even if other anesthesiologists maintained practices at SMH, (c) other, temporary, locum tenens anesthesiologists continued to

be allowed to use the CRNAs, (d) no peer review group required or consented to such action by Defendants, (e) by virtue of denying Dr. Patel the use of such CRNAs they were underutilized and (f) a number of surgeons practicing at SMH *specifically wanted* Dr. Patel to continue to provide anesthesiological services for them because of the high quality of such services and were prevented from obtaining such services because of the actions of Defendants.

Dr. Patel was given no prior notice of the termination of her right to utilize the services of the CRNAs at SMH and did not learn of such fact until she arrived at the hospital on March 27, 1991, to perform anesthesiological services for four already-scheduled patients, which commitments she was unable to fulfill as promised due to Defendants' actions. The sole purpose of the denial by Defendants to Dr. Patel of the right to use CRNAs at SMH was gratuitously and maliciously to destroy her business and practice at such hospital and such, indeed, had that effect inasmuch as she had to inform all the surgeons who had been her clients that she could no longer guarantee them coverage of all their cases, and so forced the rescission of her contractual commitments to them; it also resulted in severe emotional distress and financial loss to her.

In addition, Defendant SMH breached various contractual obligations to Dr. Patel.

B. Proceedings Below

In July, 1994, Defendants GCW and SMH moved the District Court to dismiss all claims against them pursuant to F.R.C.P. Rule 12 (b)(6), except for Dr. Patel's cause of action for breach of contract, and Defendant WHD moved

the District Court pursuant to Rule 12(b)(6) to dismiss all claims against him. On March 31, 1995, the District Court filed his interlocutory Order granting Dr. Patel's Motion to Amend Complaint and Defendants' Motions to Dismiss, together with a Memorandum Opinion supporting such Order (Pet. App. 17a to 36a). The District Court so ruled because he determined (1) that the Defendants were inherently incapable of conspiring among themselves for antitrust law purposes unless they each had an independent, economic motive for so conspiring and (2) that Dr. Patel's pleadings were insufficiently specific in detailing the injury to competition occasioned by Defendants' actions. He dismissed Dr. Patel's state law claim for emotional injury because he determined that the actions of the Defendants were insufficiently extreme and outrageous and he dismissed her claim for tortious interference with contract because the Defendants did not interact directly with the surgeons with whose contracts Dr. Patel alleged interference, but rather merely prevented Dr. Patel from performing such contracts. By Judgment and Opinion dated August 9, 1995, the District Court denied Dr. Patel's motion further to amend her Complaint and to reconsider the Order dated March 31, 1995, and granted Defendants' motion to dismiss, thereby dismissing the case in its entirety (Pet. App. at 12a to 16a). The District Court granted such Motion because he declined to retain jurisdiction over the remaining state law contract claim under 28 U.S.C. §1367(c) and denied Dr. Patel's proposed amendments to her Complaint because he found that those amendments would in no way alter his decision to dismiss reflected in his earlier Order dated March 31, 1995, which he declined to reconsider.

The Court of Appeals affirmed the holding of the lower court on July 10, 1996, in an unpublished, per curiam opinion (Pet. App. at 1a to 11a). Thereafter, Dr. Patel filed a Petition For Rehearing And Suggestion For Rehearing in Banc (Pet. App. at 39a to 58a) which, by Order dated August 13, 1996, the Fourth Circuit denied (Pet. App. at 37a to 38a). While agreeing with the District Court in all respects, the Court of Appeals rested such agreement principally on its determination that there is an absolute exemption from the antitrust law for any "staffing decision" affecting the practice of any physician even if such is effected outside of – and, indeed, in opposition to – competent peer review determinations concerning that physician.

Petitioner now seeks the review of this Court.

REASONS FOR GRANTING THE WRIT

Four reasons require the granting of certiorari to review the decision of the United States Court of Appeals for the Fourth Circuit: (1) the direct conflict of that decision with the decisions of this Court in *Summit Health Ltd. v. Pinhas*, 500 U.S. 322, 111 S.Ct. 1842, 114 L.Ed.2d 366 (1991), *Patrick v. Burget*, 486 U.S. 94, 108 S.Ct. 1658, 100 L.Ed.2d 83 (1988), *Hospital Building Co. v. Trustees of Rex Hospital*, 425 U.S. 738, 96 S.Ct. 1848, 48 L.Ed.2d 338 (1976), and *Leatherman v. Tarrant County Narcotics Unit*, ___ U.S. ___, 113 S.Ct. 1160, 122 L.Ed.2d 517 (1993); (2) the direct conflict of that decision with the decision of the Third Circuit in *Brader v. Allegheny General Hospital*, 64 F.3d 869 (3rd Cir. 1995) and the Seventh Circuit in *Hammes v. Aamco Transmissions, Inc.*, 33 F.3d 774 (7th Cir. 1994); (3)

the extraordinary departure from the accepted and usual course of judicial proceedings by the Fourth Circuit in the exercise both of its federal question and diversity of citizenship jurisdiction in the present case, by sanctioning such departures by the District Court in issuing rulings in direct conflict with controlling authority from this Court and from the Supreme Court of North Carolina; and (4) the critical importance of this case to all providers and consumers of in-hospital medical services within the United States.

I

CERTIORARI SHOULD BE GRANTED TO RESOLVE THE CONFLICT AMONG THE CIRCUITS, AND BETWEEN THE FOURTH CIRCUIT AND THIS COURT, REGARDING WHETHER THERE IS AN UNQUALIFIED, COMPLETE EXEMPTION FROM FEDERAL ANTITRUST LAW FOR ANY "STAFFING DECISION BY A SINGLE HOSPITAL AS TO A SINGLE PRACTITIONER" MADE OUTSIDE OF PEER REVIEW, WHICH REDUCES THAT PRACTITIONER'S ABILITY TO COMPETE IN THE RELEVANT MARKET.

There exists among the circuits of the federal judicial system a conflict as to whether actions which have the effect of reducing a single medical practitioner's ability to compete can ever rise to the dignity of a Sherman Antitrust claim. The Fourth Circuit in this case, purporting to follow the split (2 to 1) decision of the Seventh Circuit in *BCB Anesthesia Care v. Passavant Memorial Area Hospital*, 36 F.3d 664 (7th Cir. 1994), has ruled that when such actions constitute "a staffing decision" by a hospital, they are absolutely immune from liability under Sherman Act §1, even when made outside of peer review. Such ruling is in direct conflict with decisions of

the Third Circuit in *Brader v. Allegheny General Hospital*, 64 F.3d 869 (3rd Cir. 1995) (exclusion of one doctor from one hospital is actionable Sherman Act §1 injury), and the Seventh Circuit in *Hammes v. Aamco Transmissions, Inc.*, 33 F.3d 774 (7th Cir. 1994) (same).

More importantly, for the reasons shown below, the Fourth Circuit's ruling is also in direct conflict with the prior decisions of this Court in *Summit Health Ltd. v. Pinhas*, 500 U.S. 322, 111 S.Ct. 1842, 114 L.Ed.2d 366 (1991), *Patrick v. Burget*, 486 U.S. 94, 108 S.Ct. 1658, 100 L.Ed.2d 83 (1988), *Hospital Building Co. v. Trustees of Rex Hospital*, 425 U.S. 738, 96 S.Ct. 1848, 48 L.Ed.2d 338 (1976) and *National Gerimedical Hospital and Gerontology Center v. Blue Cross of Kansas City*, 452 U.S. 378, 101 S.Ct. 2415, 69 L.Ed.2d 89 (1981).[1]

In *Summit Health Ltd. v. Pinhas*, a plaintiff ophthomologist sued, under Sherman Act §§1 and 2, a defendant hospital, its medical staff and others for excluding him from the market in Los Angeles by terminating his staff privileges. The defendants in that case, like those in this case, alleged that that plaintiff's complaint should be dismissed because the mere exclusion of a single doctor could not have a sufficiently anti-competitive effect for purposes of the threshold jurisdictional

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[1] Although, as shown in the text, infra, the Fourth Circuit attempted to distinguish *Pinhas* from the present case and noted its conflict with the *Brader v. Allegheny General Hospital* decision of the Third Circuit, the Fourth Circuit made no reference at all to any of the remaining cases of this Court and of the Seventh Circuit cited in the text above, although their clear conflict was brought to that Court's attention in Plaintiff-Appellant's Petition for Rehearing and Suggestion for Rehearing In Banc (Pet. App. at 39a to 58a).

requirements of Sherman Act §1, and both lower courts so ruled. This Court reversed and reinstated that plaintiff's complaint. In *Brader v. Allegheny General Hospital* supra and *Hammes v. Aamco Transmissions, Inc.*, supra, the Third Circuit, and the Seventh Circuit through Judge Posner, respectively, specifically ruled, in interpreting *Pinhas*, that that case is equally applicable to find a sufficient antitrust injury, and not just the satisfaction of underlying jurisdictional requirements, if injury to a single doctor's practice is alleged, as was the case here. Inasmuch as this Court specifically ruled in *Pinhas* that the elimination of that plaintiff from the relevant market (Los Angeles) would automatically result in a reduction of his services to the public in that market (and thereby injure competition), 500 U.S. at 331, 111 S.Ct. at 1848, ___ L.Ed.2d at ___, the Third and Seventh Circuits' decisions in this regard are clearly correct. Nevertheless, the Fourth Circuit in this case found a complete exemption from federal antitrust law for "a staffing decision by a single hospital as to a single practitioner," even though such was made outside of the peer review processes, which clearly reduced that practitioner's ability to compete in the relevant market.[2]

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[2] The Fourth Circuit attempted to distinguish *Pinhas* in the present case by noting that here Dr. Patel was not *completely* excluded from the relevant market but "her ability to compete is somewhat hampered" by Defendants' actions (Pet. App. at 7a). As indicated below, this Court has previously rejected the viability of any such distinction. *National Gerimedical Hospital and Gerontology Center v. Blue Cross of Kansas City*, 452 U.S. 378, 101 S.Ct. 2415, 69 L.Ed.2d 89 (1981); *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 79 S.Ct. 705, 3 L.Ed.2d 741 (1959).

As shown in Plaintiff-Appellant's Petition for Rehearing and Suggestion for Rehearing In Banc (Pet. App. at 39a to 58a) this effort by the Fourth Circuit to avoid the plain and clear import of this Court's *Pinhas* decision is not without precedent. Indeed, in so ruling, the Fourth Circuit effectively continued a long tradition in which it and other Courts of Appeals have repeatedly attempted to erect automatic exemptions from the application of antitrust laws in the healthcare industry – particularly in disputes between physicians and hospitals – claiming there is something unique for antitrust purposes about that industry. This Court has repeatedly reversed those attempts.

In *Hospital Building Co. v. Trustees of Rex Hospital*, supra, the plaintiff corporation operated a 49-bed proprietary hospital and sued a private, tax-exempt hospital, two of its officers and a health-planning officer, alleging violations of Sherman Act Sections 1 and 2 by defendants for attempting to block the plaintiff's relocation and expansion within Raleigh, North Carolina, for purposes of the defendant hospital monopolizing the Raleigh business. In a unanimous, In Banc decision, the Fourth Circuit dismissed the complaint finding that the plaintiff's business was strictly local, with too-incidental and too insubstantial an effect on interstate commerce to rise to the dignity of a Sherman Act claim (almost exactly as it did in the present case). This Court unanimously reversed such decision, thus repudiating what could be called the "interstate commerce exemption" supposedly unique to the health care industry.

In *National Gerimedical Hospital and Gerontology Center v. Blue Cross of Kansas City*, supra, a private, acute-care

hospital in Kansas City, Mo., sought a participating hospital contract with National Blue Cross and its wholly-controlled Missouri subsidiary. Both defendants refused, claiming their internal policies legitimately barred participation by a new hospital, like that plaintiff hospital, which could not show any need for its services. Thus, those defendants, like the Defendants in the present case, claimed merely to have erected a vertical restraint justified by legitimate business reasons.

The Blue Cross defendants specifically relied on the plaintiff's failure to be approved by Mid America Health Systems Agency, a certifying designee under the National Health Planning and Resource Development Act of 1974 (NHPRDA). The plaintiff alleged the actions of the defendants constituted a wrongful refusal to deal with it, resulting in a competitive disadvantage to it. The defendants alleged that the NHPRDA impliedly repealed the Sherman Act for the conduct in question. The District Court granted summary judgment to the Defendants and the Eighth Circuit affirmed.

This Court unanimously reversed, holding, once again, that there is nothing unique about the health care industry and there is no such thing as a health care profession immunity to the Antitrust law.

The Fourth Circuit's ruling in the present case cannot be reconciled with this Court's rulings in *Rex Hospital* and *National Gerimedical*. First of all, the Court of Appeals appears to have relied on the fact that Dr. Patel's privileges were not completely terminated at SMH (which action would have required peer review) and that only certain rights she had there were reduced (the right to

use CRNAs) in finding that a mere competitive disadvantage was not a sufficient injury for antitrust purposes. *National Gerimedical* is directly to the contrary. See also *Klors, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 213, 79 S. Ct. 705, 710, 3 L.Ed.2d 741 (1959) (competitive *disadvantage* caused by concerted refusal to deal by plaintiff's suppliers – a vertical restraint – sufficient for *per se* illegality under Sherman Act). Additionally, the underpinnings of the Court of Appeal's "staffing decision" exemption – that *any* claimed excuse for actions by a hospital antitrust defendant is sufficient to immunize its actions from antitrust analysis – cannot be reconciled with this Court's refusal to find dispositive the *National Gerimedical* Defendants' far more reasonable-sounding justification for its actions, which were supported by actual, legislative authority, unlike the Defendants' actions here. See also *F.T.C. v. Indiana Federation of Dentists*, 476 U.S. 447, 106 S.Ct. 2009, 90 L.Ed.2d 445 (1986) (no "quality of care" exemption for non-competitive practices for the health care industry, whose markets are inherently local).

In *Patrick v. Burget*, supra, a plaintiff doctor sued a number of defendant doctors for attempting to destroy his privileges at a hospital in peer review proceedings. The district court and the Ninth Circuit had ruled that peer review activities were *automatically exempt* from antitrust review, as involving state action. Once again, this Court unanimously (with Mr. Justice Blackmun not participating) repudiated the lower courts and ruled expressly that there is *no* state action immunity for doctors or hospitals engaging in *any* activities (including peer review activities).[3]

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[3] The specific result in *Patrick v. Burget* was reversed by Congress in passing the Healthcare Quality Improvement Act of 1986, P.L. 99-660, Title IV, §401, 100 Stat. 3784, 42 U.S.C. §§1101

The Fourth Circuit's "staffing decision" exemption also cannot be reconciled with *Patrick v. Burget*. The Fourth Circuit's rationale for such exemption is that staffing decisions constitute internal matters (quare: internal to what?) that the courts are correctly unwilling to be involved in. The clear ruling of *Patrick v. Burget* is that even when such decisions occur in the uniquely-protected context of peer review, with all the presumptions of validity supporting actions arising therefrom, and even when such is supported by legislative authority of some kind, that is insufficient to immunize actions by hospitals and physicians against other injured physicians for restraints of trade.

The Complaint in this case shows, on its face, the glaring questionability of the legitimacy of Defendants' stated reason, which the Fourth Circuit accepts as automatically valid, for terminating Dr. Patel's right to supervise CRNA's – to-wit, that she had failed to pass a board-certification examination – inasmuch as it also notes that persons *with no training*

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et seq., a statute which, all apparently agree, has no applicability in the present case inasmuch as none of the Defendants nor either of the lower Courts have mentioned it. Prior to this Court's *Patrick v. Burget* decision, the Fourth Circuit had also found a complete immunity from antitrust laws for hospitals and physicians sued for interfering with a physician's privileges. *Coastal Neuro-psychiatric Associates v. Onslow Memorial Hospital, Inc.*, 795 F.2d 340 (4th Cir. 1986). In *Oksanen v. Page Memorial Hospital*, 945 F.2d 696 (4th Cir. 1991) (En banc), *cert. den.*, 502 U.S. 1074, 112 S.Ct. 973, 117 L.Ed.2d 137 (1992), faced with a substantially identical complaint, and no longer able to rely on its by-then repudiated state-action immunity doctrine, in a fairly transparent end-run around *Patrick*, the Fourth Circuit "discovered" a new source for such immunity in ruling that a hospital simply lacked the capacity to conspire with its staff acting in peer review under the Intracorporate Immunity Doctrine, as discussed infra.

whatsoever in anesthesia were permitted to supervise the CRNAs, and no peer review group even attempted to terminate or reduce Dr. Patel's privileges at the hospital (a fact which the Fourth Circuit indicates cuts *in favor of* the Defendants, whereas it clearly indicates a lack of any legitimate peer-level concern about Plaintiff's skills and abilities).

II

CERTIORARI SHOULD BE GRANTED TO RESOLVE THE CONFLICT AMONG THE CIRCUITS REGARDING WHETHER THE INTRACORPORATE IMMUNITY DOCTRINE, ANNOUNCED BY THIS COURT IN *COPPERWELD CORP. V. INDEPENDENCE TUBE CORP.*, 467 U.S. 752, 104 S. CT. 2731, 81 L.ED.2D 628 (1984), PRECLUDES INDIVIDUAL, NON-EMPLOYEE, NON-AGENT MEMBERS OF A HOSPITAL'S INDEPENDENT MEDICAL STAFF FROM HAVING THE CAPACITY TO ENTER INTO A CONSPIRACY, WITHIN THE MEANING OF SHERMAN ACT §1, 15 U.S.C. §1 (1990), WITH ANY HOSPITAL WHERE THEY HAVE PRIVILEGES, ABSENT AN ECONOMIC MOTIVE ON THEIR PART.

There exists among the circuits of the federal judicial system a conflict as to whether the Intracorporate Immunity Doctrine precludes individual, non-employee, non-agent members of a hospital's independent medical staff from having the capacity to enter into a conspiracy, within the meaning of Sherman Act §1, with any hospital where they have privileges, absent an economic motive on their part. The Fourth Circuit has ruled in the present case that no such conspiracy is possible, so that any such defendants are absolutely immune from liability under Sherman Act §1. In its earlier decision in *Oksanen v. Page Memorial Hospital*, 945 F.2d 696 (4th Cir. 1991) (En banc), *cert. den.*, 502 U.S. 1074, 112 S.Ct. 973, 117 L.Ed.2d 137 (1992), the Fourth Circuit had

ruled that such immunity was restricted to circumstances where the medical staff was acting *as a whole,* in peer review. It was on that basis alone that the Fourth Circuit claimed its decision therein was consistent with the decision of the Ninth Circuit in *Oltz v. St. Peter's Community Hospital,* 861 F.2d 1440 (9th Cir. 1988).

The Fourth Circuit has now extended the *Oksanen* zone of immunity and has abandoned any pretense of the reconcilability of its position with that of the Ninth Circuit in *Oltz* and has noted that its decision is also in irreconcilable conflict with the decision of the Eleventh Circuit in *Bolt v. Halifax Hospital Medical Center,* 891 F.2d 810 (11th Cir.) *cert. den.,* 495 U.S. 924, ___ S.Ct. ___, ___ L.Ed.2d ___ (1990) (Pet. App. at 6a).

In the present case, the Fourth Circuit extended *Oksanen* and ruled that when individual, non-agent members of a hospital's medical staff, like Defendant WHD, make any claim that they might be acting on behalf of the hospital[4]

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[4] In the present case, the Defendants argued, and the Fourth Circuit found, that the Defendants had a legitimate reason for taking the actions they took against Dr. Patel because she had failed to pass a board certification examination. It is clear that had such been a legitimate reason for restricting her activities at SMH, peer review committees would have been responsible for requiring such and, in any event, persons without any anesthesiological training should similarly have been excluded from supervising the CRNAs. However, as the Fourth Circuit noted, *any* doctor with any staff privileges, however temporary, at SMH *other than* Dr. Patel was permitted to utilize CRNAs, notwithstanding their complete lack of anesthesia knowledge or training. Accordingly, it is apparent that the "good reason" for Defendants action was no more than a cynical pretext which, in fact, violated the determinations of

they too must automatically be deemed to be agents of the hospital who only have the capacity to conspire with the hospital if they have an economic motive for doing so, purportedly following *Greenville Publishing Co. v. Daily Reflector, Inc.*, 496 F.2d 391 (4th Cir. 1974), cited with approval by this Court in *Copperweld*, at footnote, 15, 467 U.S. at 769, 104 S.Ct. at 2741. In the present case, Dr. Patel made no claim that the Defendants had any motive other than malice for conspiring among themselves against her.

It is clear that the general rule for antitrust law purposes is that persons interacting as principals can enter into a conspiracy for antitrust purposes without regard to their motives.[5] Potential problems arise, however, in determining whether persons are, in fact, interacting as principals, when

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responsible peer review committees at SMH which never reduced Dr. Patel's privileges in any manner.

[5] *Albrecht v. Herald Co.*, 390 U.S. 145, 88 S.Ct. 869, 17 L.Ed.2d 998 (1968) (collaborative combination for Sherman Act §1 purposes found between two entities, even where one entity received no benefit from such – economic or otherwise – and acted only pursuant to coercion, relying on *U.S. v. Park Davis Co.*, 362 U.S. 29, 80 S.Ct. 503, 4 L.Ed.2d 505 (1960), where an illegal combination to fix prices was found where the defendant specified prices for both wholesalers and retailers and required wholesalers to refuse to deal with non-complying retailers, so that in joining the combination, the complying wholesalers lost sales or at least gained nothing); *American Medical Association v. U.S.A.*, 130 F.2d 233 (D.C.Cir. 1942), *aff'd.*, 317 U.S. 519, 63 S.Ct. 326, 87 L.Ed. 434 (1943) (inability of AMA itself to profit from price-fixing conspiracy no defense to criminal antitrust violation: economic motives irrelevant); *Counsel of Defense v. International Magazine Co.*, 267 F. 390 (8th Cir. 1920) (Sherman Act §1 violation found where Counsel of Defense sought to boycott a publishing company because of pro-German sympathies of its owner and not for economic motives).

one of them is, at least for some purposes, the agent of the other. In such cases inquiry into motives of the controlled person may be appropriate – to determine whether he may be considered a principal with the capacity for co-conspiring with the otherwise-controlling person. It is apparent that absent the conclusion that WHD was an agent of a SMH, the general rule of antitrust law would be applicable and no inquiry into his motives would be warranted. No facts support any such conclusion of his agency.

As indicated above, *Oksanen* represents a fairly transparent effort by the Fourth Circuit to continue the result it had been reaching in pre-*Patrick* decisions – absolute immunity for antitrust defendants in the present circumstances – which this Court repudiated in *Patrick*. Thus, in *Oksanen* that Court had the result of immunity in mind without a doctrine to support it; hence, its invocation of the Intracorporate Immunity Doctrine there and, later, here. The problem with that doctrine is it requires the existence of a relationship of absolute control between the putative conspirators; and hospitals and their medical staff are, in fact, separate entities neither of which control the other. In *Oksanen*, the Fourth Circuit was able to fictionalize such control to the medical staff as a whole acting in peer review. In the present case, that Court has expanded that fiction to include a defendant, such as WHD, who was neither an agent *nor* an employee of the hospital.

The decisions of the Fourth Circuit in this regard here and in *Oksanen* are irreconcilable with the decision of this Court in *National Gerimedical Hospital and Gerontology Center v. Blue Cross of Kansas City*, discussed above, where the defendants were National Blue Cross and its wholly-controlled Missouri subsidiary. No problem with intracorporate immunity was even suggested, let alone found, in that case.

The Fourth Circuit offered no reasoned analysis or support for extending its intracorporate immunity holding in *Oksanen* to the present case, where the actions of all Defendants admittedly took place outside of peer review, other than its observation that any "staffing decision" concerning a staff member must *automatically be deemed* to be made by individuals acting in an agency capacity. This tautology specifically begs the question raised by Dr. Patel in the present case where she alleges that the individual Defendants, in fact, acted *against* the interests of the Defendant hospital and usurped whatever agency authority they had in excluding her from using CRNAs outside of peer review processes. As pointed out by Dr. Patel in her Petition for Rehearing, this finding by the Fourth Circuit has the effect of undermining the very pro-peer review policies it claimed to be protecting in *Oksanen*.

This Court has specifically ruled that the purpose of the doctrine of Intracorporate Immunity is to *promote* competition, *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 768-774, 104 S.Ct. 2731, 2740-2743, 81 L.Ed.2d 628 (1984), reasoning that since vigorous competition, which is at the base of our free market economy, is dependent upon the ability of firms to execute unitary corporate policy, concerted action within a single firm may be presumed to be *pro*-competitive and therefore beneficial to society. By holding that a hospital and its medical staff as a whole constitute a single enterprise, the decision of the Fourth Circuit in *Oksanen* expands the concept of what constitutes a single "firm" for this purpose well beyond anything contemplated in *Copperweld*, thereby creating huge areas of absolute immunity from the antitrust laws in the in-hospital healthcare industry, since within a single "firm," no violation of antitrust law can occur. The Fourth Circuit has now shown its

intention further to expand its concept of a single "firm" for this purpose creating even broader areas of immunity from the antitrust laws.

III

CERTIORARI SHOULD BE GRANTED TO RESOLVE THE CONFLICT AMONG THE CIRCUITS, AND BETWEEN THE FOURTH CIRCUIT AND PRIOR DECISIONS OF THIS COURT, REGARDING WHETHER A PLAINTIFF IN A SHERMAN ACT §1 CASE MUST AFFIRMATIVELY ALLEGE THAT A VERTICAL RESTRAINT, WHICH HAS THE EFFECT OF REDUCING THE COMPETITIVENESS OF A PLAINTIFF IN OFFERING HER SERVICES TO THE PUBLIC, ALSO HAS THE SPECIFIC EFFECT OF RAISING PRICES TO CONSUMERS, IN ORDER TO SURVIVE A F.R.C.P. RULE 12(b)(6) MOTION TO DISMISS.

There exists among the circuits of the federal judicial system a conflict as to how detailed a plaintiff must be in her Complaint in describing the injuries to competition in order to set out a non-dismissable claim under Sherman Act §1. In the present case, the Fourth Circuit affirmed the District Court's dismissal of Dr. Patel's Complaint for failure to state a sufficient antitrust injury ruling "that her Complaint was completely void of any allegations as to the effect of the defendants' actions on competition in the market for anesthesiology services, effect on the price of anesthesiology services, or effect on the availability of anesthesiology services to the public." (Pet. App. at 8a)

In fact, Dr. Patel pleaded, consistent with this Court's decision in *FTC v. United Federation of Dentists*, 476 U.S. 447, 106 S.Ct. 2009, 90 L.Ed.2d 445 (1986), that the 32-mile area surrounding defendant SMH constituted the relevant market and, since SMH constituted the only hospital within that

market, the effect of Defendants' actions in reducing Dr. Patel's ability to compete and serve her customers therein constituted an antitrust violation.

In *Hammes v. Aamco Transmission, Inc.*, the Seventh Circuit has specifically ruled that, at the motion to dismiss stage, "it is quite enough, probably more than enough, if the complaint alleges that the plaintiff was engaged in interstate commerce and was injured by the alleged antitrust violation . . . a plaintiff is not required to plea the particulars of his claim." 33 F.3d at 781-782. In so ruling, the Seventh Circuit stated it was simply following the dictates of this Court in *Leatherman v. Tarrant County Narcotics Unit*, ___ U.S. ___, 113 S.Ct. 1160, 1163, 122 L.Ed.2d 517 (1993) (no "heightened pleading standard" except as provided in F.R.C.P. Rule 9(b): notice pleading sufficient except in fraud cases). In reaching its irreconcilably contrary decision in the present case, the Fourth Circuit relied, once again, on its "staffing decision" characterization of defendants' actions.[6]

The Fourth Circuit seized upon what it claimed to be a valid health-care reason for Defendants' actions – Dr. Patel's failure to pass an exam – even while acknowledging that

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[6] The Fourth Circuit reasoned "all Patel has alleged is a staffing decision, allegedly based on malice, which the Court is not in a position to second guess. Only where the anti-competitive effects were obvious could Patel rely on her meager pleadings. [citations omitted]. Furthermore, there are legitimate grounds for the staffing decision – Patel failed to pass her boards as required by her contract. Thus, the Defendants had reason to limit Patel's access to the hospital's resources. Repeatedly, courts have found that "a staffing decision by a single hospital as to a single practitioner, in the absence of harm to the relevant market, does not constitute an anti-trust injury. [Citations omitted]." (Pet App. at 9a)

persons with *no* anesthesia training whatsoever were permitted to utilize CRNAs and that *only* Dr. Patel was excluded from such. Since she was precluded from hiring her own CRNAs, the destruction of her competitiveness resulted from more than merely, as the Fourth Circuit stated, a hospital benignly "withholding its own resources" from an undeserving staff member. The absence of any peer review determination that Dr. Patel's privileges should have been restricted or reduced in any manner shows that Defendants' actions actually *violated* peer review decisions regarding her.

The magic of the Fourth Circuit's "staffing decision" characterization of Defendants' actions is that it reduces an entire market (in which antitrust violations could, of course, occur) to a single "firm," in which competitive disadvantages effected by Defendants become inconsequential: It creates an irrebuttable presumption of validity even for naked restraints like that involved here which should otherwise at least have to undergo rule of reason analysis.

Additionally, as shown above, the decision of the Fourth Circuit in this regard cannot be reconciled with prior decisions of this Court in *Summit Health Limited v. Pinhas*, *Goldfarb v. Virginia State Bar Association*, 421 U.S. 773, 95 S.Ct. 2004, 44 L.Ed.2d 572 (1975), (fee schedule set by Bar Association violated Sherman Act §1 even absent any showing that the fee schedule resulted in the raising of fees, Court Syllabus, 421 U.S. at 774, 95 S.Ct. at 2006, and Opinion 421 U.S. at 785 - 791, 95 S.Ct. at 2002 - 2014); *National Gerimedical Hospital and Gerontology Center v. Blue Cross of Kansas City*, discussed above, *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, discussed above, and *Arizona v. Maricopa County Medical Society*, 457 U.S. 332, 102 S.Ct. 2466, 73 L.Ed.2d 48 (1982) (per se violation of Sherman Act §1 where effect of defendants' complained-of-actions was to *preclude* price increases).

IV

CERTIORARI SHOULD BE GRANTED TO RESOLVE THE CONFLICT AMONG THE FOURTH CIRCUIT AND THE COURTS OF THE STATE OF NORTH CAROLINA CONCERNING THE CIRCUMSTANCES IN WHICH IT IS APPROPRIATE TO GRANT A MOTION TO DISMISS, PURSUANT TO F.R.C.P. RULE 12(b)(6), REGARDING A PLAINTIFF'S CLAIM FOR TORTIOUS INTERFERENCE WITH CONTRACT AND INTENTIONAL INFLICTION OF SEVERE EMOTIONAL DISTRESS.

The Fourth Circuit simply adopted, without discussion, the decision of the District Court dismissing all of Dr. Patel's state law tort claims (Pet. App. at 9a). The District Court was unable to find a single North Carolina case which supported its decision and, instead, relied on a facially incorrect characterization of the facts alleged by Dr. Patel in the Complaint.[7] The lower courts' blatant mischaracterization of Dr. Patel's pleadings show a complete disregard for their obligations to exercise their diversity jurisdiction in a case they apparently deemed beneath the dignity of the federal courts. This clearly represents a significant departure from the accepted and usual course of judicial proceedings.

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[7] The lower courts "found" that Dr. Patel in this case was alleging interference with her contract with SMH as the basis for her tortious interference claim, whereas, in fact, such claim was based on Defendants' interference with her contractual commitments *with the surgeons* practicing at SMH. (Pet. App. at 32a)

A. The Lower Courts Erred In Failing To Rule That Dr. Patel's Claim For Intentional Or Reckless Inflicting Of Severe Emotional Distress Clearly Alleges Conduct Sufficiently Outrageous Or Extreme For Such Claim To Survive A Motion To Dismiss.

Dr. Patel's Complaint clearly alleges that, for no valid business purpose of their own, and merely out of personal malice, Defendants SMH, GCW and WHD attempted to and succeeded in, destroying Dr. Patel's practice by denying her the right to use CRNAs. Also as alleged, Dr. Patel had to inform all the surgeons who had been her clients of this humiliating deprivation and was prevented from properly fulfilling commitments for already-scheduled surgeries on March 27, 1991. These facts clearly constitute an allegation that Defendants maliciously intended to, and did, destroy Dr. Patel's business and profession, *thereby* causing nonemotional injury to her *which injury in turn resulted in* the complained-of emotional distress. The very cases relied on by the lower courts make clear that applicable North Carolina law would clearly permit recovery for severe emotional injuries in such circumstances, even if they were only caused by Defendants' negligence, as opposed to their alleged intentional or reckless behavior. *Dickens v. Puryear*, 302 N.C. 437, 276 S.E.2d 325 (1981); *Johnson v. Ruark Obstetrics and Gynecology Association P.A.*, 327 N.C.2d 3, 395 S.E.2d 85 (1990).

In *Dickens* the defendants beat and threatened the plaintiff with castration, death, etc. and thereby caused actual physical injury to him (he had sex and drugs with their 17-year-old daughter). The plaintiff sued too late to allege battery (it was past the statute of limitations for such), but the Court sustained his claim for "intentionally or recklessly"

causing mental distress. 267 S.E.2d at 332. The Court specifically disapproved of dictum in *Stauback v. Stauback*, 297 N.C. 181, 254 S.E.2d 611 (1979), which dictum required some *physical* injury for such recovery (although such was in fact present in *Dickens*). Thus, the Court intimated that *mental distress alone*, if caused by sufficiently extreme conduct, could be sufficient to base a claim under North Carolina law.

North Carolina courts have also invariably found liability when a plaintiff's mental distress results directly from physical *or financial* injury caused by the malicious acts of defendants, as Dr. Patel alleged here.

In *Johnson v. Ruark Obstetrics*, supra, the Supreme Court of North Carolina noted that North Carolina had actually recognized claims for *negligent* infliction of emotional distress *for over one hundred years*, even absent a physical injury to a plaintiff, and thereby explicitly extended *Dickens v. Puryear*. In *Johnson* the plaintiffs were expectant parents whose fetus was stillborn and who sued the defendant for providing negligent prenatal care. The North Carolina Supreme Court sustained their claims for negligent infliction of emotional distress.

In dismissing Dr. Patel's claim, the District Court found, and the Fourth Circuit affirmed, that Dr. Patel's injuries resulted simply from Defendants' terminating her contract *with them*. As shown above, such is not Dr. Patel's claim at all.

B. The Lower Court Erred In Failing To Rule That Dr. Patel Has Clearly Alleged All The Elements Of A Valid Claim For Tortious Interference With Contract Against Defendants

The very cases relied on by Defendants, below – *United Lab, Inc. v. Kuykendall*, 322 NC 643, 370 S.E.2d 375 (1988), and *American Aluminum Products, Inc. v. Pollard*, 97 N.C. App. 541, 389 S.E.2d 589 (N.C. App. 1980), clearly demonstrate the strength of Dr. Patel's allegations against defendants for tortious interference with contract and the fact that the District Court erred in granting their motion to dismiss such claim.

In *United Lab, Inc. v. Kuykendall*, supra, the plaintiff manufactured and sold specialty chemical products through a nationwide system of sales representatives. The defendant was a salesman for the plaintiff who eventually quit and went to work for one of the plaintiff's rivals, taking customers he previously had served for the plaintiff. The defendant employee had a valid covenant not to compete and his new employer, also a defendant, promised to protect the former employee by paying all his legal costs in defending against the covenant not to compete. All the defendants alleged they had a good faith belief that the covenants not to compete were unenforceable so that their complained-of acts of violating such covenants were justified. However, the court rejected that defense and ruled the *jury* should decide the issue: neither the plaintiff *nor* the defendant in that case was entitled to a directed verdict on the defendant's liability, as the trial court had ruled.

In addition, *neither* party was entitled to a *directed verdict*, let alone a *demurrer*, such as the lower courts granted here, concerning the defendant employer's liability because

it was not clear that the employee's breach *had been caused by the new employer,* rather than solely by the employee's *own* activities. The North Carolina Supreme Court held in *Kuykendall,* that even between competitors, a tortious interference with contract claim will lie in North Carolina if the requisite *malice* on the part of a defendant, as is clearly alleged by Dr. Patel here, can be shown. Under the *Kuykendall* case, Defendants clearly should not have been entitled to a *motion to dismiss* in this case on this claim, in any event.

Similarly, in *American Aluminum Products v. Pollard,* supra, the plaintiff sold and installed aluminum products. The defendants were salesmen who quit and went to work for a competitor of the plaintiff and were also partners. The defendants had received advanced commissions from the plaintiff for sales which they induced the buyers to breach and to let their new employer perform. The court found that since the defendants had previously represented the plaintiff *it was clearly malicious* for them to induce their former customers to breach the contracts with the plaintiff, so that *even though they argued they had a legitimate business reason* – competing with plaintiff – a claim for tortious interference with contract against them remained necessarily valid.

In the present case, as alleged by Dr. Patel, the Defendants had *no* legitimate business reason for denying her the right to utilize (non-exclusively) CRNAs. As the District Court noted, none of the Defendants competed with her for anesthesiological services. Indeed, the pleadings are clear that *no motive other than malice* could have driven the Defendants in their actions toward Dr. Patel. The *inevitable* effect of terminating Dr. Patel's rights to utilize the CRNAs was to compel her to disclose such to the surgeons on existing cases who the Defendants knew to be her clients. By being unable to serve them without the CRNAs Dr. Patel was *forced* into

the breach of her contracts with each surgeon when her CRNA rights were terminated.

Thus, unlike the defendants in *St. Mary's Hospital of Athens, Inc., v. Radiology Professional Corp.*, 205 GA App. 121, 421 S.E.2d 731 (1992), *cert. den.*, relied on by defendants and the lower courts, the Defendants in this case did indeed "directly induce adverse behavior by third parties." 421 S.E.2d at 735.

V

CERTIORARI SHOULD BE GRANTED BECAUSE OF THIS CASE'S CRITICAL IMPORTANCE TO ALL PROVIDERS AND CONSUMERS OF IN-HOSPITAL MEDICAL SERVICES IN THE UNITED STATES

In-hospital health care represents a significant portion of this country's economy on which the lives of tens of thousands of its citizens daily depend. The Fourth Circuit in this case has shown its determination to erect an ever-expanding zone of immunity from the antitrust laws in that area, in the deliberate face of repeated rulings by this Court to the effect that no such immunity is warranted nor permitted under existing law.

CONCLUSION

It is respectfully submitted that the Petition for Writ of Certiorari be granted in light of the patent and irreconcilable conflict between the Fourth Circuit's decision below and numerous decisions of this Court and of other circuits and the danger posed to the in-hospital healthcare industry by the Fourth Circuit's apparent determination substantially to

exempt it from the antitrust laws, a policy other circuits may well follow.

Respectfully submitted,

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APPENDIX

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Appendix A	Judgment and Opinion of the United States Court of Appeals for the Fourth Circuit filed July 10, 1996.	1a
Appendix B	Opinion of the United States District Court for the Middle District of North Carolina dated August 9, 1995.	12a
Appendix C	Memorandum Opinion of United States District Court for the Middle District of North Carolina dated March 31, 1995.	17a
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APPENDIX A
UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

URVASHI B. PATEL, an Individual,
Plaintiff-Appellant,

v.

SCOTLAND MEMORIAL HOSPITAL, a North Carolina Corporation; W. HARLEY DAVIDSON; GREGORY C. WOOD,
Defendants-Appellees.

No. 95-2704

Appeal from the United States District Court
for the Middle District of North Carolina, at Rockingham.
William L. Osteen, Sr., District Judge.
(CA-94-284-3)

Argued: April 3, 1996

Decided: July 10, 1996

Before WIDENER, MURNAGHAN, and WILLIAMS,
Circuit Judges.

Affirmed by unpublished per curiam opinion.

COUNSEL

ARGUED: Clifford Neil Ribner, Tulsa, Oklahoma, for Appellant. Peter J. Covington, SMITH, HELMS, MULLISS & MOORE, L.L.P., for Appellees. **ON BRIEF:** Denise S. Cline, MOORE & VAN ALLEN, Raleigh, North Carolina, for Appellant. James H.

Guterman, Maurice O. Green, SMITH, HELMS, MULLISS & MOORE, L.L.P.; George C. Covington, KENNEDY, COVINGTON, LOBDELL & HICKMAN, L.L.P., Charlotte, North Carolina, for Appellees.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

OPINION

PER CURIAM:

Urvashi B. Patel, plaintiff-appellant, filed a lawsuit against Scotland Memorial Hospital ("SMH"), Harley Davidson, SMH's Chief of Staff during most of the time the events at issue occurred, and Gregory Wood, who was promoted to be SMH's Chief Administrator during the relevant time period, (collectively "the defendants"), alleging a violation of the Sherman Antitrust Act § 1, 15 U.S.C. § 1 (1988). Additionally, she raised numerous state law claims—namely, a violation of North Carolina's antitrust laws, tortious interference with contractual relations, intentional infliction of severe emotional distress, and breach of contract. The district court dismissed four of the five claims for failure to state a claim upon which relief could be granted and subsequently dismissed the remaining claim for lack of subject matter jurisdiction. Patel appeals the district court's dismissal of her claims as well as its refusal to allow her to amend her complaint a second time. Federal jurisdiction is based both on federal question jurisdiction, 28 U.S.C. § 1331 (1988), and diversity-of-citizenship jurisdiction, 28 U.S.C. § 1332 (1988). For the following reasons, we affirm.

I.

In 1988, Patel entered into the first of a series of contracts with SMH. Under her contract, she agreed to serve as the Medical Director of the Department of Anesthesiology at SMH, to provide 24-hour

anesthesiology services to SMH, and to direct SMH's certified registered nurse anesthetists ("CRNAs"). In return, SMH agreed not to enter into any other similar contracts.[1] With the help of CRNAs, Patel was able to supervise anesthesiology services in multiple operations simultaneously and to build a lucrative practice, earning as much as $750,000 per year.

As a condition of her contract, Patel agreed to pass her medical boards in anesthesiology within two years. Patel, however, failed to pass her boards within two years. Consequently, SMH notified her in October 1990 of its intent to terminate her contract, but allowed her temporarily to maintain her privileges under the contract. Subsequently, on March 27, 1991, SMH terminated the contract and withdrew Patel's contract privileges. While SMH allowed Patel to maintain staff privileges and to practice anesthesiology at the hospital, it forbade all CRNAs from working with her. CRNAs were allowed, however, to work with all other doctors with staff privileges.

The loss of the use of CRNAs meant that Patel could not maintain the practice she had built by superving the anesthesiology in numerous operations simultaneously. She was forced to cancel contracts she had with other physicians to provide anesthesiology services and she experienced a dramatic loss of income in her practice.

Patel filed a lawsuit against SMH, Davidson, and Wood alleging: (1) a Sherman Antitrust Act § 1 violation, 15 U.S.C. § 1; (2) a violation of North Carolina's antitrust laws; (3) tortious interference with contractual relations; (4) intentional infliction of severe emotional distress; and (5) breach of contract. Patel asked for and was granted permission to amend her complaint once.

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[1]As alleged in her complaint, Patel's contract provided that she was "to serve as the Medical Director of the Department of Anesthesiology at SMH, supervise its certified registered nurse anesthetists ("CRNAs") and provide twenty-four hour per day three-hundred-sixty-five days-per-year coverage of anesthesiology services for SMH, in exchange for which SMH agreed not to make any similar contractual agreement to any other anesthesiologist 'for the medical direction of CRNAs.'" Complaint ¶7, amended complaint ¶7, and proposed second amended complaint, ¶7.

The district court dismissed all claims against the defendants under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief could be granted, with the exception of the breach of contract claim against SMH. Patel subsequently requested permission to amend her complaint a second time. The district court denied her motion to file a second amended complaint on the grounds that the amendment would be futile. The district court also dismissed the remaining contract claim for lack of subject matter jurisdiction, and dismissed the lawsuit. Patel appealed.

II.

Patel argues that the district court erred by: (1) dismissing her Sherman Antitrust Act, state antitrust, tortious interference with contract, and intentional infliction of emotional distress claims for failure to state a claim upon which relief could be granted; (2) refusing to allow her to amend further her complaint; and (3) refusing to exercise its supplemental jurisdiction over her breach of contract claim against SMH. We address each argument in turn.

A. *Rule 12(b)(6) Dismissals*

We review dismissals pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure *de novo*. *Estate Constr. Co. v. Miller & Smith Holding Co.*, 14 F.3d 213, 217 (4th Cir. 1994). In conducting our review of a Rule 12(b)(6) dismissal, we construe the factual allegations in the nonmoving party's complaint as true. We will affirm "only if it appears that the plaintiff[ ] would not be entitled to relief under any facts which could be proved in support of [her] claim." *Id.* at 218 (citation omitted). Thus, we do not evaluate whether Patel has established any facts in comparison to those alleged by the defendants, but rather examine whether, if all the facts she alleged were true, she could make out her claims.

1. *Sherman Act § 1 Claim*

Patel argues that Davidson, Wood, and SMH conspired in violation of the Sherman Antitrust Act § 1, 15 U.S.C. § 1, to prevent her from using CRNAs, which were essential to her practice. She concedes that

SMH, Davidson, and Wood had a right to terminate her contract based on her failure to pass the Boards. Her claim is based, thus, only on the defendants' decision to disallow CRNAs from working with her, which she contends was motivated by a malicious intent to destroy her practice.

Section one of the Sherman Antitrust Act prohibits combinations or contracts in restraint of trade.[2] In order to survive the defendants' Rule 12(b)(6) motion on a § 1 claim, Patel must allege facts which, if proven true, would establish the necessary elements of a Sherman Act § 1 violation: (1) an agreement between at least two legally distinct persons or entities; and (2) that the agreement imposed an unreasonable restraint on trade. *Estate Constr.*, 14 F.3d at 220-21. Patel's amended complaint fails to allege adequately those two elements.

a. *Agreement to Conspire*

Unilateral action is not considered actionable under § 1 of the Sherman Act. Thus § 1 applies only to concerted action. *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 761 (1984). "Proof of concerted action requires evidence of a relationship between at least two legally distinct persons or entities." *Oksanen v. Page Memorial Hosp.*, 945 F.2d 696, 702 (4th Cir. 1991) (en banc). *cert. denied*, 502 U.S. 1074 (1992). Under the doctrine of intraenterprise immunity, courts generally find that a company cannot conspire with its officers or employees because of the unity of economic interest between the company and its employees. *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 769-71 (1984).

We have previously found that where the hospital staff acts as an agent of the hospital, the Board of Trustees of a hospital and the medical staff comprise a single entity and, therefore, are immune from Sherman Act § 1 lawsuits. *Oksanen*, 945 F.2d at 699, 703. *Contra Bolt v. Halifax Hosp. Medical Ctr.*, 891 F.2d 810, 818-19 (11th Cir.),

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[2]Section 1 provides, in pertinent part:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.

cert. denied, 495 U.S. 924 (1990) (rejecting the rule that a hospital cannot conspire with its medical staff for purposes of § 1 liability).[3] We reasoned that a hospital and its staff have a unity of interest in seeking to provide and upgrade the quality of patient care. *Oksanen*, 945 F.2d at 703. "Far from being a competitor with the hospital, the medical staff [i]s in fact a natural component of the hospital's management." *Id.* Similarly, here, we conclude that SMH and its medical staff could not conspire with one another in violation of Sherman Act § 1 where the staff acted as the hospital's agent.

Patel seeks to distinguish *Oksanen* by arguing that Davidson and Wood did not act as agents of the hospital when they conspired to direct SMH's CRNAs not to work with her. We are not convinced. Members of the hospital staff, especially those with administrative positions, such as Chief Administrator, clearly have responsibilities to ensure adequate and quality care by the staff at the hospital, protect against malpractice, ensure efficient operation, cut costs, and the like. Staffing decisions and directives by the staff, and particularly the Chief of Staff or Chief Administrator, to that end are made as agents of the hospital. Patel had failed to meet the conditions of her contract. Thus, SMH and its agents had reasons to terminate her contract and to restrict her access to hospital resources.

Patel also argues that an exception to the intraenterprise immunity doctrine applies. Where the individuals on the medical staff have an independent personal stake in obtaining the objectives of the alleged conspiracy, intraenterprise immunity does not apply. *Id.* at 705. In *Oksanen* we explicitly limited the personal stake exception, however, to include only instances where the individual conspiring has a personal financial interest in the conspiracy independent of the principal —here SMH. *Id.*; *see also Siegel Transfer, Inc. v. Carrier Express, Inc.*, 54 F.3d 1125, 1136-37 (3d Cir. 1995) (exception to intraenterprise conspiracy doctrine arises "only where an agent acts to further

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[3]The Eleventh Circuit has rejected expressly our holding in *Oksanen*, reasoning that the agency relations in the corporate context are different from those in a hospital where it finds that staff members are distinct and independent from the hospital. *See also Oltz v. St. Peter's Community Hosp.*, 861 F.2d 1440, 1450 (9th Cir. 1988) (rejecting application of intraenterprise immunity doctrine to the hospital context).

his own economic interest in a marketplace actor which benefits from the alleged restraint and causes his principal to take the anticompetitive actions"); *Pink Supply Corp. v. Hiebert, Inc.*, 788 F.2d 1313, 1318 (8th Cir. 1986) (personal stake exception applies only where agent of employer has "an economic stake in the gain to be realized from the anticompetitive conspiracy"). None of the defendants had a direct economic interest in Patel's status at SMH or competed with her. Thus, the personal stake exception does not apply.

Finally, Patel attempts to limit the holding in *Oksanen* to the peer review process only—the process by which the doctor in *Oksanen* had been excluded from practicing at a hospital and through which the doctor alleged the hospital and its staff had effected an illegal restraint of trade. We find the peer review distinction unhelpful. Where hospital staff acts as an agency of the hospital—whether it is through peer review or mere staffing decisions regarding efficiency, safety, quality, or similar issues—there is a unity of interests. That unity is only destroyed where the staff acts for a personal economic motive outside of its agency.

b. *Antitrust Injury*

Patel has also failed to allege adequately facts necessary to demonstrate an antitrust injury. Mere economic injury to Patel alone is insufficient. Instead, Patel must demonstrate an impact on the competition as a whole within the relevant market. *Oksanen*, 945 F.2d at 708.[4]

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[4]Patel argues that the exclusion of a single doctor from the market is sufficient to allege an antitrust injury. We first note that Patel has not necessarily even been excluded from the relevant market. She has only been denied the use of CRNAs at SMH. She may still practice anesthesiology at SMH by herself (although her ability to compete is somewhat hampered because of her inability to use CRNAs). There are no allegations that she has been unable to practice elsewhere because of SMH's actions. Furthermore, the case law she relies on, *Summit Health, Ltd. v. Pinhas*, 500 U.S. 322 (1991), addresses the jurisdictional prerequisite for filing an antitrust lawsuit. *Oksanen*, 945 F.2d at 702 n.1. In *Oksanen*, a summary judgment ruling, we found that while the jurisdictional prerequisite had been met, the plaintiff still failed to demonstrate an antitrust injury for purposes of surviving a motion for summary judgment. 945

There are two methods of demonstrating economic injury. The first is to demonstrate *per se* illegal agreements whose effects are so plainly anticompetitive that no elaborate study of the industry is needed. *National Soc'y of Professional Eng'rs v. United States*, 435 U.S. 679, 692 (1978). Patel concedes in her brief that she does not allege a *per se* Sherman Act violation.

The second approach is termed "the rule of reason." *Id.* at 692-93. Under a rule of reason analysis, the plaintiff must demonstrate an unreasonable restraint of trade. That requires Patel to allege in her complaint a relevant market, facts demonstrating that trade was restrained in that market, and that the defendants played a significant role in restraining trade. *Oksanen*, 945 F.2d at 708-09.

Patel alleges that the defendants' actions, which prohibited her from using CRNAs, destroyed her medical practice. The district court found, however, that her complaint was completely void of any allegations as to the effect of the defendants' actions on competition in the market for anesthesiology services, effect on the price of anesthesiology services, or effect on the availability of anesthesiology ser-

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F.2d at 702 n.1, 709. Patel's reliance on *Pinhas* asks the court, in essence, to adopt a more lenient standard on a motion to dismiss than is required on a motion for summary judgment. *See Bracken v. Allegheny General Hosp.*, 64 F.3d 869, 875-78 (3d Cir. 1995). In effect, she requests that the court adopt a standard for alleging an antitrust injury that is similar, if not identical, to the jurisdictional requirement. The question of federal jurisdiction, however, is distinct from that of whether the underlying claim which supports jurisdiction fails to state a claim upon which relief can be granted. *Re/Max Internat'l v. Realty One, Inc.*, 900 F. Supp. 132, 150 n.10 & 150 (N.D. Ohio 1995). Thus, we have held that when confronted with a Rule 12(b)(6) motion to dismiss a Sherman Antitrust Act § 1 claim, "we must determine whether allegations covering all the elements that comprise the theory for relief have been stated as required." *Estate Constr.*, 14 F.3d at 220 (citation omitted). In an antitrust lawsuit, we require that the plaintiff plead facts in terms that are neither vague nor conclusory. *Id.* at 220-21. We, therefore, conclude that to survive a 12(b)(6) motion the plaintiff must allege sufficiently a cognizable antitrust injury, which includes allegations of negative impact on the relevant market.

vices to the public. Rather, it found her complaint focused on the injuries she incurred, not those the competitive market incurred. We agree.

All Patel has alleged is a staffing decision, allegedly based on malice, which the court is not in a position to second guess. Only where the anticompetitive effects were obvious could Patel rely on her meager pleadings. *Oksanen*, 945 F.2d at 79. Furthermore, there were legitimate grounds for the staffing decision—Patel failed to pass her Boards as required by her contract. Thus, the defendants had reason to limit Patel's access to the hospital's resources. Repeatedly, courts have found that a staffing decision by a single hospital as to a single practitioner, in the absence of harm to the relevant market, does not constitute an antitrust injury. *Oksanen*, 945 F.2d at 708-10; *BCB Anesthesia Care, Ltd. v. Passavant Memorial Area Hosp. Ass'n*, 36 F.3d 664, 667-69 (7th Cir. 1994) (listing numerous cases). Personal economic injury alone, *e.g.*, loss of income, is simply not enough to support a claim under § 1 of the Sherman Act. There must be some cognizable effect on the competitive market. Thus, we affirm the district court's dismissal of Patel's Sherman Antitrust Act § 1 claim.

2. *Remaining State Claims*

The district court also dismissed Patel's state antitrust claim, her tortious interference with contractual relations, and her intentional infliction of emotional distress claims for failure to state a claim upon which relief could be granted. We have reviewed those claims and the record and adopt the reasoning of the district court as to those claims.

B. *Rule 12(b)(1) Dismissal*

The district court dismissed Patel's one remaining claim against SMH for lack of subject matter jurisdiction. Patel alleged breach of contract against the defendants for failure to reimburse her for expenditures she incurred on their behalf. Patel conceded that the claim applied only to SMH. After the dismissal of Patel's Sherman Act claim, no federal question jurisdiction remained. After the dismissal of three of the four remaining state claims, diversity jurisdiction no longer applied because the sole remaining claim was for $45,000—an amount insufficient to meet the jurisdictional requirements of diver-

sity jurisdiction. 28 U.S.C. § 1332(a). SMH therefore moved to dismiss the breach of contract claim under Rule 12(b)(1) of the Rules of Federal Civil Procedure for lack of subject matter jurisdiction.

The district court refused to exercise its supplemental jurisdiction over the breach of contract claim and dismissed it without prejudice. Where the district court has dismissed all claims that conferred federal jurisdiction, it may decline to exercise its supplemental jurisdiction. 28 U.S.C. § 1367(c)(3). Patel contends on appeal, however, that the district court should have exercised its supplemental jurisdiction over the breach of contract claim.

We review a refusal to exercise supplemental jurisdiction for abuse of discretion. *Shanaghan v. Cahill*, 58 F.3d 106, 112-13 (4th Cir. 1995). Courts generally refuse to exercise supplemental jurisdiction where the claims conferring jurisdiction were dismissed at a very early stage and there is no overriding interest in economy or convenience dictating that the federal court retain jurisdiction. *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 350 n.7 (1988); *Stetka v. Hunt Real Estate Corp.*, 859 F. Supp. 661, 668-69 (W.D. N.Y. 1994). Indeed, dismissal in such a case is the preferred course of action unless there are overriding factors in favor of retaining federal jurisdiction. Here, no factors dictated that the court retain its jurisdiction. Therefore, we conclude that the district court did not abuse its discretion.

C. *Refusal to Allow Further Amendments to Complaint*

The district court allowed Patel to amend her complaint once. It, however, refused to allow Patel to amend her complaint a second time. We review the district court's denial of Patel's second motion to amend her complaint for abuse of discretion. *New Beckley Mining Corp. v. International Union, United Mine Workers of America*, 18 F.3d 1161, 1164 (4th Cir. 1994).

Rule 15(a) of the Federal Rules of Civil Procedure provides that "a party may amend the party's pleading only by leave of the court or by written consent of the adverse party" after a responsive pleading had been served. "[L]eave shall be freely given when justice so requires." Fed.R.Civ.P. 15(a). Leave, however, need not be granted

where the proposed amendment would be futile. *New Beckley Mining*, 18 F.3d at 1164. We have reviewed Patel's proposed second amended complaint and conclude that the district court's finding that the amendment would be futile and resulting refusal to allow the amendment were not an abuse of discretion.

For the foregoing reasons, we

AFFIRM.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
ROCKINGHAM DIVISION

URVASHI B. PATEL, an Individual,	)	
Plaintiff,	)	
v.	)	3:94CV00284
SCOTLAND MEMORIAL HOSPITAL, W. HARLEY DAVIDSON, and GREGORY C. WOOD,	)	
Defendants.	)	

MEMORANDUM OPINION

(Filed Aug. 09, 1995)

OSTEEN, District Judge

This matter comes before the court on Defendant Scotland Memorial Hospital's Motion to Dismiss Plaintiff's Remaining Claim for Lack of Subject Matter Jurisdiction, Plaintiff Urvashi B. Patel's Motion to Reconsider Order Dated March 31, 1995, or, in the Alternative, to Certify That There is No Just Reason for Delay Pursuant to Rule 54(b), and on Plaintiff's Motion to Amend Complaint.

Plaintiff's original complaint alleged causes of action against Defendants Scotland Memorial Hospital ("SMH"), Gregory C. Wood, and W. Harley Davidson for violation

of the Sherman Act, violation of the North Carolina antitrust laws, tortious interference with contract, intentional infliction of emotional distress, and breach of contract. Plaintiff subsequently moved to amend the complaint to add additional factual allegations, and Defendants moved to dismiss the complaint. In an order dated March 31, 1995, the court granted Plaintiff's Motion to Amend and granted Defendants' Motions to Dismiss, thereby dismissing all claims in the case except the breach of contract claim against SMH.

I. SCOTLAND MEMORIAL HOSPITAL'S MOTION TO DISMISS

SMH now moves to dismiss Plaintiff's remaining breach of contract claim for lack of subject matter jurisdiction. Jurisdiction in this case was originally based upon the existence of a federal question and upon diversity. *See* 28 U.S.C. §§ 1331, 1332. However, after dismissal of Plaintiff's federal antitrust claim, no federal question exists in this case, and Plaintiff concedes that her remaining breach of contract claim is for $45,000, insufficient to meet the jurisdictional amount necessary for diversity jurisdiction. Therefore, no independent basis for jurisdiction over this breach of contract claim exists. *See McGowan v. Warnecke*, 739 F. Supp. 662, 663-64 (D.D.C. 1990) (where claim is aggregated with other claims to reach jurisdictional amount and other claims are dismissed, remaining claim must itself satisfy jurisdictional amount requirement for diversity jurisdiction to exist).

The court did, however, originally have supplemental jurisdiction over the breach of contract claim by virtue

of its being pled with the federal antitrust claim. *See* 28 U.S.C. § 1367(a). "The district court may decline to exercise supplemental jurisdiction over a claim [if] . . . the district court has dismissed all claims over which it has original jurisdiction." 28 U.S.C. § 1367(c). Although the decision to retain or dismiss a claim under § 1367(c) is discretionary, courts generally decline to retain jurisdiction where the claims over which the court had original jurisdiction were dismissed at a very early stage and there exist no overriding interests in economy or convenience that compel retention of the state claim. *See, e.g., Stetka v. Hunt Real Estate Corp.*, 859 F. Supp. 661, 668-69 (W.D.N.Y. 1994); *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 350 n.7, 108 S. Ct. 614, 619 n.7, 98 L. Ed. 2d 720 (1988) (where "all federal-law claims are eliminated before trial, the balance of factors to be considered under the pendent jurisdiction doctrine – judicial economy, convenience, fairness, and comity – will point toward declining to exercise jurisdiction over the remaining state-law claims"). In the case at bar, Plaintiff's federal claim was dismissed at an early stage, and no other overriding interests exist which compel the court to retain jurisdiction over the remaining state law claim. Therefore, the court declines to retain jurisdiction over the remaining state law claim under 28 U.S.C. § 1367(c), and Plaintiff's breach of contract claim against SMH will be dismissed.

II. PLAINTIFF'S MOTION TO AMEND

Plaintiff wishes to further amend her complaint in an effort to save her claims from dismissal. Plaintiff has proposed amendments to ¶¶ 4, 12, 20, 22, 24, 25, 28, and 32 of her Amended Complaint. Rule 15(a) of the Federal

Rules of Civil Procedure states that where an answer has been filed in response to a complaint, the complaint may be amended "only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires." Leave need not be granted, however, where the proposed amendment would be futile. *Foman v. Davis*, 371 U.S. 178, 182, 83 S. Ct. 227, 230, 9 L. Ed. 2d 222 (1962). The decision to grant leave to amend is entrusted to the discretion of the district court. *Keller v. Prince George's County*, 923 F.2d 30, 33 (4th Cir. 1991).

Having reviewed each of Plaintiff's proposed amendments, the court finds that the proposed amendments would in no way alter the court's decision to dismiss Plaintiff's claims as reflected in the court's opinion and order dated March 31, 1995. Therefore, the court finds that the amendments would be futile, and Plaintiff's Motion to Amend will be denied.

III. PLAINTIFF'S MOTION FOR RECONSIDERATION/ CERTIFICATION

Finally, Plaintiff moves for reconsideration of the court's March 31, 1995, opinion and order dismissing all of Plaintiff's claims except the breach of contract claim against SMH. In the alternative, Plaintiff moves for certification of the March 31, 1995, order as a final order under Rule 54 so that the order may be appealed immediately. Given the court's decision to decline jurisdiction over Plaintiff's one remaining claim, no claims remain in the case and the certification issue is moot. Furthermore, Plaintiff's motion for reconsideration will be denied for

the reasons stated in the court's March 31, 1995, opinion and order.

A judgment in accordance with this memorandum opinion shall be filed contemporaneously herewith.

This the 9th day of August, 1995.

/s/ Illegible
United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
ROCKINGHAM DIVISION

URVASHI B. PATEL, an Individual,	)	
Plaintiff,	)	
v.	)	3:94CV00284
SCOTLAND MEMORIAL HOSPITAL, W. HARLEY DAVIDSON, AND GREGORY C. WOOD,	)	
Defendants.	)	

MEMORANDUM OPINION

(Filed Mar. 31, 1995)

OSTEEN, District Judge

This matter comes before the court on Plaintiff Urvashi B. Patel's Motion to Amend Complaint and Defendants' Motions to Dismiss. Defendants Scotland Memorial Hospital and Gregory C. Wood seek to dismiss the first, second, third, and fourth claims for relief against them, and Defendant W. Harley Davidson seeks to dismiss all five claims for relief against him. For the reasons stated herein, Plaintiff's Motion to Amend Complaint will be granted, and Defendants' Motions to Dismiss will be granted.

MOTION TO AMEND COMPLAINT

Plaintiff moves to amend the complaint in this action. The Amended Complaint contains several clarifications and additional factual allegations, but does not add or change any claims for relief and does not alter the substance of the allegations previously made. Therefore, in the court's discretion and because no prejudice is caused to Defendants, *see* Fed. R. Civ. P. 15(a), Plaintiff's Motion to Amend Complaint will be granted. Furthermore, because none of the additional allegations in the Amended Complaint prevent or affect disposition of Defendants' Motions to Dismiss, the court will treat Defendants' Motions to Dismiss as directed to the Amended Complaint.

MOTIONS TO DISMISS

Plaintiff Urvashi B. Patel ("Patel") asserts five claims for relief in her Amended Complaint: (1) violation of § 1 of the Sherman Act, (2) violation of North Carolina antitrust law, (3) tortious interference with contractual relations, (4) intentional infliction of emotional distress, and (5) breach of contract. Each of these claims is asserted against all three Defendants: Scotland Memorial Hospital ("SMH"), W. Harley Davidson ("Davidson"), and Gregory C. Wood ("Wood").

I. FACTUAL BACKGROUND

Taking the allegations of the Amended Complaint to be true, as this court must on a motion to dismiss, it

appears that beginning in October 1988, Patel, an anesthesiologist, entered the first of a series of contracts with SMH under which she became the exclusive provider of anesthesiology services to SMH. Under the contracts, Patel provided 24-hour service to SMH and directed SMH's certified registered nurse anesthetists ("CRNAs"). In her practice at SMH, Patel provided anesthesiology services for each of the surgeons practicing at SMH. Because her exclusive contract required around-the-clock coverage every day of the year, and because surgeries often occurred simultaneously, the CRNAs assisted Patel and Patel's use of the CRNAs was vital to the performance of her practice. Under this contract, Patel earned as much as $750,000.00 per year as exclusive provider of anesthesiology services to the hospital.

As a condition, of her exclusive contract with SMH, Patel agreed to pass the anesthesiology written board examination within two years of October 1988. Patel failed to pass the written board examination within this time period. Thus, in October 1990, Patel was given notice by SMH of its intent to terminate her exclusive contract. At that time, however, SMH expressed to Patel that her rights under the contract would remain intact for the time being, and Patel continued to practice under this exclusive contract arrangement. Then, on March 27, 1991, SMH officially terminated its contract with Patel. Patel was prohibited from using SMH's CRNAs, although she retained her staff privileges. As a result of her not being allowed to utilize CRNAs, Patel could no longer provide services to all surgeons practicing at SMH at the same time, and her practice was destroyed as surgeons began using other anesthesiologists.

Patel alleges that the decision to terminate her contract and restrict her use of the CRNAs is the result of an unlawful agreement to restrain trade between SMH, Davidson, who is a pathologist at SMH and was chief of staff during this period, and Wood, an employee of SMH, who was promoted to chief administrator during this period. Patel alleges that the purpose behind the conspiracy was to maliciously destroy her practice at the hospital by preventing her from having the CRNAs at her disposal.

II. DISCUSSION

The Fourth Circuit has continually adhered to the view that a Rule 12(b)(6) motion should be granted only in very limited circumstances. *Rogers v. Jefferson-Pilot Ins. Co.*, 883 F.2d 324, 325 (4th Cir. 1989). The Fourth Circuit has long held "that a motion to dismiss for failure to state a claim for relief should not be granted unless it appears to a certainty that the plaintiff would be entitled to no relief under any state of facts which could be proved in support of his claim." *Id.* (quoting *Johnson v. Mueller*, 415 F.2d 354, 355 (4th Cir. 1969)). Thus, the sole question in resolving a motion to dismiss is whether, viewing the allegations of the complaint in the light most favorable to the plaintiff, the complaint states any valid claim for relief.

A. Federal Antitrust Claim

In her first claim for relief, Patel alleges that SMH, Davidson, and Wood violated § 1 of the Sherman Act by conspiring to restrain trade in combining to destroy her

medical practice. Section 1 of the Sherman Act provides, in pertinent part:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is declared to be illegal.

15 U.S.C. § 1. To prove a violation of the Act, a plaintiff must establish two elements: (1) at least two persons acted in concert to restrain trade, and (2) the restraint complained of constitutes an unreasonable restraint on interstate trade or commerce. *Estate Constr. Co. v. Miller & Smith Holding Co., Inc.*, 14 F.3d 213, 220 (4th Cir. 1994).

In antitrust cases, where "the proof is largely in the hands of the alleged conspirators," dismissals prior to giving the plaintiff ample opportunity for discovery should be granted very sparingly. *Hospital Bldg. Co. v. Trustees of the Rex Hosp.*, 425 U.S. 738, 746, 96 S. Ct. 1848, 1853, 48 L. Ed. 2d 338 (1976). However, when reviewing a motion to dismiss a claim under § 1 of the Sherman Act, the court must determine whether "allegations covering all the elements that comprise the theory for relief" have been stated as required. *Estate Constr.*, 14 F.3d at 220. The essential elements of the antitrust violation must be alleged in terms that are neither vague nor conclusory. *Id.* at 221. A mere allegation that "the defendants violated the antitrust laws as to a particular plaintiff and commodity" is insufficient to survive a Rule 12(b)(6) motion. *Id.* Although the court will assume that Plaintiff can prove the facts alleged, it is not proper to assume that Plaintiff can prove facts that she has not alleged or that Defendants have violated the antitrust laws in ways that have not been alleged. *Id.* In the case at bar, accepting the

allegations of the Amended Complaint to be true, Patel has failed to state a claim under § 1 for at least two reasons.

1. Cognizable Antitrust Conspiracy

First, Patel has failed to allege a legally cognizable antitrust conspiracy. Section 1 of the Sherman Act applies only to concerted activity; unilateral conduct is excluded from its purview. *Oksanen v. Page Memorial Hosp.*, 945 F.2d 696, 702 (4th Cir. 1991), *cert. denied*, 502 U.S. 1074, 112 S. Ct. 973, 117 L. Ed. 2d 137 (1992). Proof of concerted action requires evidence of a relationship between at least two legally distinct entities. *Id.* Generally, a company cannot conspire with its officers or employees because of the unity of economic interest between the company and the employees. *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 769-70, 104 S. Ct. 2731, 2740-41, 81 L. Ed. 2d 628 (1984). The Fourth Circuit has applied this principle to hold that a hospital and members of its staff are not legally distinct entities capable of conspiring in violation of § 1. *Oksanen*, 945 F.2d at 704-05.

In the case at bar, Patel alleges a conspiracy between SMH, Chief of Staff Davidson, and Chief Administrator Wood. The possibility of a legally recognized conspiracy among these parties seems foreclosed by *Copperweld*, as both Davidson and Wood acted as agents of SMH. However, Patel argues that the conspiracy alleged in her Amended Complaint falls under the "personal stake" exception to the general principle prohibiting a finding of conspiracy between a corporate entity and its staff. In *Greenville Publishing Co. v. Daily Reflector, Inc.*, 496 F.2d

391 (4th Cir. 1974), the Fourth Circuit recognized that a company can conspire with its employees when such employees have "an independent personal stake in achieving the corporation's illegal objective." *Id.* at 399. Patel asserts that Davidson and Wood have such a personal stake here, because the "sole purpose" of the conspiracy to terminate her exclusive contract and prevent her use of the CRNAs was "maliciously to destroy her business and practice at such hospital." (Am. Compl. ¶ 24.)

Such a motive cannot support a finding of conspiracy under the personal stake exception, however, because the Fourth Circuit has limited the exception to circumstances where the employee has an *economic* interest in furthering the conspiracy. In *Oksanen,* the Fourth Circuit refused "to extend the personal stake exception beyond the rationale underlying the *Greenville* decision." 945 F.2d at 705. The *Greenville* court held that the president of a company could conspire with the company where the president had a financial interest in another firm that competed with the plaintiff and the firm would directly benefit if the plaintiff were eliminated as a competitor. 496 F.2d at 400. The *Oksanen* court refused to extend this exception to apply to a hospital and its medical staff where the members of the staff did not directly compete with the plaintiff doctor for patients and did not stand to benefit financially from elimination of the plaintiff doctor's privileges at the hospital. 945 F.2d at 705. Patel alleges that Davidson and Wood acted because of a personal motive of malice in preventing her use of the CRNAs; she fails to allege any economic motivation on their part or any

economic benefit that accrued to them upon the destruction of her practice.[1] Therefore, the personal stake exception does not apply in the case at bar. *See Pink Supply Corp. v. Hiebert, Inc.*, 788 F.2d 1313, 1317-18 (8th Cir. 1986) (personal stake exception applies only where agent of an employer has an economic stake in the gain to be realized from the anticompetitive object of the conspiracy).

Patel relies on *Oltz v. St. Peter's Community Hosp.*, 861 F.2d 1440 (9th Cir. 1988), as supporting the position that the personal stake exception applies in the case at bar. In *Oltz*, the Ninth Circuit found that a group of anesthesiologists could conspire with a hospital to violate § 1 by

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[1] Patel argues that the personal nature of the individual Defendants' motives is "wholly irrelevant" to their ability to participate in a conspiracy, citing *Albrecht v. Herald Co.*, 390 U.S. 145, 88 S. Ct. 869, 19 L. Ed. 2d 998 (1968). While this may be true, it is equally true that the nature of the motivation is wholly relevant to the application of the personal stake exception. *Albrecht* supports both propositions. In *Albrecht*, the United States Supreme Court found that a conspiracy in violation of § 1 could exist between a newspaper publisher, an independent newspaper distributor, and a separate company retained by the publisher for the purpose of diverting the plaintiff's customers to the distributor. The *Albrecht* court held that a conspiracy could exist even though one of the defendants received no benefit from the conspiracy and acted only because of coercion. *Id.* at 149-50, 88 S. Ct. at 871-72. However, each of the three defendants was a separate company, and, therefore, *Albrecht* is not relevant to the present discussion of the personal stake exception. In the case at bar, it is Patel's burden to allege that the individual Defendants were motivated economically to participate in the alleged conspiracy, and she has chosen to allege that they were motivated solely by personal concerns. *Albrecht* in no way controls application of the personal stake exception to the circumstances at bar.

entering an exclusive staff agreement to the detriment of the plaintiff nurse anesthetist. 861 F.2d at 1450-51. However, *Oltz* differs from the case at bar in that the plaintiff nurse anesthetist and the defendant anesthesiologists were in direct competition for business at the defendant hospital. The Ninth Circuit noted that the "[defendant] anesthesiologists were independent contractors pursuing their personal economic interests when they pressured [the hospital] to eliminate [the plaintiff] as a direct competitor." 861 F.2d at 1450. Thus, liability in *Oltz* was premised upon a finding of personal economic motivation on the part of the hospital staff who conspired with the hospital.

In contrast, Patel has alleged no economic motive on the part of Davidson and Wood, and Davidson and Wood are not in competition with Patel for patients. Like the Fourth Circuit in *Oksanen*, the Ninth Circuit in *Oltz* limited liability under § 1 for a conspiracy among a hospital and its staff to circumstances where the individual defendants have an economic interest in furthering the conspiracy. *Oltz* therefore does not require application of the personal stake exception to the circumstances at bar. Patel has failed to allege a cognizable antitrust conspiracy.

2. Cognizable Antitrust Injury

Patel's § 1 claim may also be dismissed because she has failed to allege a cognizable antitrust injury. Section 1 does not prohibit all restraints on trade, only those that are unreasonable. *National Soc'y of Professional Eng'r v. United States*, 435 U.S. 679, 687-88, 98 S. Ct. 1355, 1363, 55 L. Ed. 2d 637 (1978). Courts have used two approaches in

assessing the reasonableness of a trade restraint. In the first category are agreements that are illegal *per se*, because their nature and necessary effect are so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality. *Oksanen*, 945 F.2d at 708. *Per se* violations include, for example, horizontal and vertical price-fixing, division of a market into territories, certain tying arrangements, and certain group boycotts. *Capital Imaging Assoc., P.C. v. Mohawk Valley Medical Assoc., Inc.*, 996 F.2d 537, 542-43 (2d Cir. 1993) (listing cases), *cert. denied*, 114 S. Ct. 388, 126 L. Ed. 2d 337 (1993). All other agreements are assessed under the "rule of reason," where the court weighs all the circumstances of the restraint in deciding whether or not the restriction imposes an unreasonable restraint on competition. *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 49, 97 S. Ct. 2549, 2557, 53 L. Ed. 2d 568 (1977). Courts have generally reviewed the denial of hospital privileges to a single practitioner under the rule of reason, *see Flegel v. Christian Hosp., N.E.-N.W.*, 4 F.3d 682, 686 (8th Cir. 1993) (listing cases), and the parties agree that this case requires a rule of reason analysis.

The antitrust laws "were enacted for the protection of competition, not competitors." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488, 97 S. Ct. 690, 697, 50 L. Ed. 2d 701 (1977). Thus, to allege a viable § 1 claim, Patel must allege more than mere individual injury. Instead, she must allege "antitrust injury," which is injury that "reflect[s] the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation." *Balaklaw v. Lovell*, 14 F.3d 793, 797 (2d Cir. 1994). The term "anticompetitive" in this context has a special

meaning. Anticompetitive actions are not those "that merely injure competitors, but [are] actions that harm the competitive process, a process that aims to bring consumers the benefits of lower prices, better products and more efficient production methods." *Interface Group, Inc. v. Mass. Port Auth.*, 816 F.2d 9, 10 (1st Cir. 1987). The Fourth Circuit has addressed the antitrust injury requirement in the context of a hospital-doctor relationship:

> [A] plaintiff cannot demonstrate the unreasonableness of a restraint merely by showing that it caused him an economic injury. For example, the fact that a hospital's decision caused a disappointed physician to practice medicine elsewhere does not of itself constitute an antitrust injury. If the law were otherwise, many a physician's workplace grievance with a hospital would be elevated to the status of an antitrust action. To keep the antitrust laws from becoming so trivialized, the reasonableness of a restraint is evaluated based on its impact on competition as a whole within the relevant market.

Oksanen, 945 F.2d at 708 (citations omitted).

In the case at bar, Patel alleges that Defendants' actions in terminating her exclusive contract and prohibiting her from using the CRNAs caused the destruction of her medical practice. However, the Amended Complaint is devoid of any allegations regarding the effect of Defendants' actions on competition in the market for anesthesiology services, on the price of anesthesiology services, or on the availability of anesthesiology services to the public. The focus of Patel's allegations are on the injury

she incurred, rather than any effect the Defendants' actions had on competition in the relevant markets.[2]

Courts have uniformly held that a staffing decision by a single hospital regarding a single practitioner does not itself constitute an antitrust injury. *Oksanen*, 945 F.2d at 708; *BCB Anesthesia Care, Ltd. v. Passavant Memorial Area Hosp. Ass'n*, 36 F.3d 664, 667-69 (7th Cir. 1994); *Harron v. United Hosp. Ctr., Inc.*, 522 F.2d 1133, 1134 (4th Cir. 1975) ("it is frivolous to urge that the employment of a single doctor to operate the radiology department of a hospital invokes the Sherman Act"), *cert. denied*, 424 U.S. 916, 96 S. Ct. 1116, 47 L. Ed. 2d 321 (1976). Patel has not alleged that Defendants' actions caused a reduction in competition, or even that the actions affected competition.[3] In light of the

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[2] The court also notes that Patel has failed to allege the markets affected by the alleged conspiracy. Where an anesthesiologist is prohibited from practicing in a certain hospital, the relevant markets affected are (1) the consumers of anesthesiology services, and (2) the providers of anesthesiology services. *Balaklaw*, 14 F.3d at 793. Patel's Amended Complaint contains no allegations regarding the effect of her being prohibited from using CRNAs on these markets.

[3] Patel argues that *Summit Health, Ltd. v. Pinhas*, 500 U.S. 322, 111 S. Ct. 1842, 114 L. Ed. 2d 366 (1991), supports the position that exclusion of one practitioner from a hospital is sufficient to allege anticompetitive effect. *Pinhas*, however, holds only that the jurisdictional requirement of showing that the agreement at issue affects interstate commerce is met by alleging that a hospital, its owners, and its staff conspired to exclude the plaintiff doctor from practicing at the hospital. *Id.*, 111 S. Ct. at 1848-49. In fact, the lower court in *Pinhas* found that the plaintiff had sufficiently alleged antitrust injury because the complaint alleged that the plaintiff provided services at a lower price than his competitors by performing operations at a faster

nature of her allegations, the circumstances at bar are nearly identical to those meriting dismissal in *Lie v. St. Joseph Hosp. of Mt. Clemins, Mich.*, 964 F.2d 567 (6th Cir. 1992), wherein the Sixth Circuit stated:

> Dr. Lie can show only that he suffered economic injury, a loss of personal income. He shows no evidence to suggest an injury to competition in the form of increased cost or reduced supply of services or harm to the consumer. He produces nothing that suggests an illegal restraint of trade. In the absence of such a showing, Dr. Lie has no antitrust complaint.

Id. at 570. Like the plaintiff in *Lie*, Patel does not allege injury to competition in the form of increased cost, reduced supply of services, or harm to the patient.[4] Patel

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rate than that of his competitors. *Pinhas v. Summit Health, Ltd.*, 894 F.2d 1024, 1032 (9th Cir. 1989), *aff'd*, 500 U.S. 322, 111 S. Ct. 1842, 114 L. Ed. 2d 366 (1991). In the case at bar, Patel has made no allegations regarding the effect of her preclusion from using SMH's CRNAs on the price of anesthesiology services offered at the hospital or on competition among anesthesiology service providers.

[4] Patel argues that Defendants have failed to set forth any pro-competitive justifications for their actions. However, this argument is without merit because such justifications are required only where the plaintiff has carried its own initial burden under the rule of reason of showing a restraint on competition. *Capital Imaging*, 996 F.2d at 547. Patel has failed to make any allegations which could support a finding that Defendants' actions were anticompetitive in the sense of harming "the competitive process" rather than merely harming any one competitor. *See Interface Group*, 816 F.2d at 10. Patel's allegations have focused solely on the effect of Defendants' actions on her.

has alleged no "adverse economic consequences" to anyone but herself, and personal economic injury is simply insufficient to support a claim under § 1 of the Sherman Act. *See Balaklaw*, 14 F.3d at 800; *Cogan v. Hartford Memorial Hosp.*, 843 F. Supp. 1013, 1018 (D. Md. 1994) (claim dismissed where "[t]he only harm asserted [by plaintiff] is his inability to continue working at the Hospital").

"[I]t is the nature of competition that at some point there are winners and losers, and the losers are excluded." *Konik v. Champlain Valley Physicians Hosp. Medical Ctr.*, 733 F.2d 1007, 1015 (2d Cir.), *cert. denied*, 469 U.S. 884, 105 S. Ct. 253, 83 L. Ed. 2d 190 (1984). Although Patel may be troubled by her practice at SMH being destroyed, nothing in her allegations could support a finding that it was destroyed as the result of anticompetitive behavior in violation of § 1 of the Sherman Act. Patel has failed to allege a cognizable antitrust conspiracy and has failed to allege antitrust injury, and therefore her federal antitrust claim will be dismissed.

B. North Carolina Antitrust Claim

In her second claim for relief, Patel alleges that the actions of Defendants violate North Carolina antitrust law and Chapter 75 of the General Statutes of North Carolina. North Carolina courts treat § 1 of the Sherman Act as "instructive" in determining the application of Chapter 75 and the state antitrust laws. *Cameron v. New Hanover Memorial Hosp., Inc.*, 58 N.C. App. 414, 293 S.E.2d 901, 918, *disc. rev. denied*, 307 N.C. 127, 297 S.E.2d 399 (1982). Therefore, the reasons supporting dismissal of Patel's claim under § 1 of the Sherman Act apply equally

to her claim under North Carolina antitrust law. *Sewell Plastics, Inc. v. Coca-Cola Co.*, 720 F. Supp. 1196, 1220 (W.D.N.C. 1989), *aff'd*, 912 F.2d 463 (4th Cir. 1990), *cert. denied*, 498 U.S. 1110, 111 S. Ct. 1019, 112 L. Ed. 2d 1101 (1991). Patel's second claim for relief for violation of North Carolina antitrust law will be dismissed.

C. Tortious Interference With Contractual Relations

In her third claim for relief, Patel alleges that Defendants' actions constitute tortious interference with contractual relations in violation of North Carolina law. Patel alleges that Defendants wrongfully interfered with contracts between her and the surgeons at SMH for whom she provided anesthesiology services. (Am. Compl. ¶ 30.)

To establish a claim for tortious interference with contract, a plaintiff must allege and prove: (1) a valid contract between the plaintiff and a third person which confers upon the plaintiff a contractual right against a third person; (2) the defendant knows of the contract; (3) the defendant intentionally induces the third person not to perform the contract; (4) in doing so the defendant acts without justification; and (5) the plaintiff suffers actual damages as a result. *United Lab., Inc. v. Kuykendall*, 322 N.C. 643, 370 S.E.2d 375, 387 (1988). In the case at bar, Patel alleges in essence that Defendants' actions in terminating her contract and prohibiting her from using the CRNAs forced her to rescind her agreements with surgeons for whom she was to provide anesthesiology services.

Such an allegation cannot support a claim for tortious interference with contract. A claim for tortious interference with contract requires that the defendant affirmatively induce a third party to breach its contract with the plaintiff. *See Clark v. Brown*, 99 N.C. App. 255, 393 S.E.2d 134, 139, *disc. rev. denied*, 327 N.C. 426, 395 S.E.2d 675 (1990). A claim of breach by Defendants of a contract with Patel which in turn causes Patel to breach contracts with third parties (the surgeons) does not support a claim for tortious interference with contract without some allegation that Defendants affirmatively induced the third parties to breach their contracts with Patel. The circumstances at bar are akin to those in *St. Mary's Hosp. of Athens, Inc. v. Radiology Professional Corp.*, 421 S.E.2d 731 (Ga. App. 1992), wherein the Georgia Court of Appeals held that the plaintiff did not state a claim for tortious interference with contract in the same situation:

> Each alleged wrongful incident arose out of performance of the contractual relationship between St. Mary's and RPC, not as the result of any inducement directed toward [the third party radiologists]. [RPC] do[es] not allege that St. Mary's induced radiologists not to enter into or continue their contracts with RPC. Instead, [RPC] claim[s] that the unreasonable performance by St. Mary's of its own contracts with [RPC] caused such a result. While such acts might provide a basis for a breach of contract claim . . . they cannot provide the basis for a claim of intentional interference with RPC's contractual relationship with others. . . . [I]n such a circumstance the claimant still must prove that the defendant directly induced adverse behavior by the third party with respect to the third

> party's contract with the claimant, not merely that the defendant breached *its* contract with the claimant and that an element of damage resulting from that breach was the impairment of the claimant's performance of its contract with the third party.

Id., 421 S.E.2d at 735. Like RPC's allegations in *St. Mary's*, Patel's allegations in the case at bar may support a claim for breach of contract, but cannot support a claim for tortious interference with contract. Patel has failed to allege that Defendants affirmatively induced the third party surgeons to breach their contractual agreements with Patel. Therefore, Defendants' Motions to Dismiss Patel's claim for tortious interference with contractual relations will be granted.

D. Intentional Infliction of Emotional Distress

In her fourth claim for relief, Patel alleges that Defendants' actions constitute intentional infliction of emotional distress. Patel alleges that it is "the malicious injury to her business, dignity and reputation" resulting from Defendants' actions in preventing her use of CRNAs and spreading falsehoods about her professional ability that forms the basis for this claim. (Pl.'s Mem. at 29.)

A claim for intentional infliction of emotional distress requires allegations and proof of (1) extreme and outrageous conduct (2) which is intended to cause and does cause (3) severe emotional distress to another. *Briggs v. Rosenthal*, 73 N.C. App. 672, 327 S.E.2d 308, 311, *cert. denied*, 314 N.C. 114, 332 S.E.2d 479 (1985). The question of whether the conduct alleged is sufficiently extreme

and outrageous to support an action is initially a question of law. *Lenins v. K-Mart Corp.*, 98 N.C. App. 590, 391 S.E.2d 843, 848 (1990). Conduct is extreme and outrageous only where it is "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." *Briggs*, 327 S.E.2d at 311. Mere failure to honor a commercial contract is insufficient to support an action for intentional infliction of emotional distress. *Beasley v. Nat'l Savings Life Ins. Co.*, 75 N.C. App. 104, 330 S.E.2d 207, 210 (1985), *appeal dismissed*, 316 N.C. 372, 341 S.E.2d 338 (1986).

In the case at bar, Patel alleges that the Defendants' actions in prohibiting her use of CRNAs and in attempting to prevent her from receiving full privileges by spreading falsehoods about her professional performance constitute extreme and outrageous conduct. However, North Carolina courts have been reluctant to find extreme and outrageous conduct arising out of actions in the workplace, finding such conduct to exist only in the most drastic circumstances. *See Hogan v. Forsyth Country Club Co.*, 79 N.C. App. 483, 340 S.E.2d 116, *disc. rev. denied*, 317 N.C. 334, 346 S.E.2d 140 (1986) (extreme and outrageous conduct where supervisor sexually harasses employee and threatens employee with knife); *Brown v. Burlington Indus., Inc.*, 93 N.C. App. 431, 378 S.E.2d 232 (1989), *appeal dismissed*, 326 N.C. 356, 388 S.E.2d 769 (1990) (extreme and outrageous conduct where employer makes sexually suggestive remarks to employee three times a week for an extended period of time). Such drastic circumstances do not exist in the case at bar. Although the acts alleged of Defendants may be viewed as inappropriate or even

insensitive, the acts do not rise to the level of extreme and outrageous conduct. *See Haburjak v. Prudential Bache Sec., Inc.*, 759 F. Supp. 293 (W.D.N.C. 1991) (no extreme and outrageous conduct where stockbroker terminated so that employer could obtain his business); *Trought v. Richardson*, 78 N.C. App. 758, 338 S.E.2d 617, *disc. rev. denied*, 316 N.C. 557, 344 S.E.2d 18 (1986) (no extreme and outrageous conduct where hospital officers told other hospital employees that plaintiff was discharged for lack of credibility, knowing that plaintiff's job at the hospital was the most important aspect of her life). Defendants' Motion to Dismiss Patel's claim for intentional infliction of emotional distress will be granted.

E. Breach of Contract

In her final claim for relief, Patel alleges that Defendants committed breach of contract by failing to reimburse her for various expenditures she incurred on their behalf. Only Davidson has moved to dismiss this claim, and Patel concedes that her breach of contract claim applies only to SMH and neither Davidson nor Wood have any liability for the claim. (Pl.'s Mem. at 2.) Therefore, Davidson's Motion to Dismiss the breach of contract claim will be granted. The court will also dismiss the breach of contract claim as to Wood, as Patel has conceded that Wood has no liability on the claim. Patel may proceed on the breach of contract claim against SMH.

CONCLUSION

For the reasons stated herein, Plaintiff's Motion to Amend Complaint will be granted. Defendants SMH and

Wood's Motion to Dismiss the first, second, third, and fourth claims for relief against them will be granted. Defendant Davidson's Motion to Dismiss all five claims for relief against him will be granted. Because Plaintiff concedes that the fifth claim for relief does not apply to Defendant Wood, the court will also dismiss the fifth claim for relief against Defendant Wood. Plaintiff may proceed on the fifth claim for relief against Defendant SMH.

An order in accordance with this memorandum opinion shall be filed contemporaneously herewith.

This the 31 day of March, 1995.

/s/ Illegible
United States
District Judge

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
August 13, 1996

No. 95-2704
CA-94284-3

URVASHI B. PATEL, an Individual

Plaintiff – Appellant

v.

SCOTLAND MEMORIAL HOSPITAL, a North Carolina Corporation; W. HARLEY DAVIDSON; GREGORY C. WOOD

Defendants – Appellees

On Petition for Rehearing with
Suggestion for Rehearing In Banc

The appellant's petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied.

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

For the Court,

/s/ Bert M. Montague
CLERK

APPENDIX E

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT CASE NO. 95-2704

URVASHI B. PATEL, an individual,
Plaintiff-Appellant,
v.
SCOTLAND MEMORIAL HOSPITAL, a North Carolina Corporation, W. Harley Davidson, an individual and Gregory C. Wood, an individual,
Defendants-Appellees.

APPEAL
FROM FINAL JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
(Filed Jul. 23, 1996)

PLAINTIFF-APPELLANT'S PETITION FOR REHEARING AND SUGGESTION FOR REHEARING IN BANC

This document is filed on behalf of Urvashi B. Patel, Plaintiff-Appellant by:

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UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT
CASE NO. 95-2704

URVASHI B. PATEL, an individual,)
Plaintiff-Appellant,)
v.)
SCOTLAND MEMORIAL HOSPITAL, a North Carolina Corporation, W. Harley Davidson, an individual and Gregory C. Wood, an individual,)
Defendants-Appellees.)

PLAINTIFF-APPELLANT'S PETITION FOR REHEARING AND SUGGESTION FOR REHEARING IN BANC

Urvashi B. Patel, Plaintiff-Appellant (the "Plaintiff"), hereby petitions this Court for a rehearing of her case pursuant to Rule 40 of the Federal Rules of Appellate Procedure ("FRCP") and offers this suggestion for a rehearing in banc pursuant to FRCP Rule 35.

INTRODUCTION

On July 10, 1996, Circuit Judges Widener, Murnaghan and Williams affirmed by unpublished, per curiam opinion the opinion of the District Court in this case. Rehearing and in banc review should be granted for any one or all of the following reasons:

1. In counsel's judgment, the Court of Appeals overlooked a number of material matters, both factual and legal.

Specifically, the Court of Appeals overlooked the following legal matters:

a) Plaintiff does not claim that the personal stake exception to the intraenterprise immunity doctrine applies here. That exception only applies if the putative Defendants are in fact agents of the hospital in their actions. Plaintiff claims that neither individual Defendant was acting as an agent of SMH in the complained-of circumstances and, indeed, acted *against* SMH's interests solely to serve such personal purposes, so that no such exception is even relevant, let alone applicable here.

b) The Court of Appeals overlooked the fact that in *Oksanen v. Page Memorial Hospital*, 945 F.2d 696 (4th Cir. 1991) [En Banc], *cert. den.*, 502 U.S. 1074, 112 S.Ct. 973, 117 L.Ed.2d 137 (1992), this Court specifically limited its finding of intraenterprise immunity for defendant physicians acting with the defendant hospital therein to their actions *within the confines of peer review* because in that unique circumstance they were acting as agents of the hospital. Accordingly, it is only by extending *Oksanen* beyond its own terms that Defendant Davidson could be found to have been an agent of Defendant SMH under the complained-of circumstances.

c) There is *no* judicially-recognized or legislatively-sanctioned blanket exception to the application of antitrust law for "a staffing decision by a single hospital as to a single practitioner," as the Court incorrectly determined. *Summit Health Ltd. v. Pinhas*, 500 U.S. 322, 111

S.Ct. 1842, 114 L.Ed.2d 366 (1991), *Patrick v. Burget*, 486 U.S. 94, 108 S.Ct. 1658, 100 L.Ed.2d 83 ( ); *Brader v. Allegheny General Hospital*, 64 F.3d 869 (3rd Cir. 1995); *Hammes v. Aamco Transmission, Inc.*, 33 F.3d 774 (7th Cir. 1994). (All discussed *infra*)

d) In counsel's judgment, the Court of Appeals overlooked the fact that not a single North Carolina case has granted a motion to dismiss Plaintiff's state law tort claims under these circumstances. All cases relied on by the District Court, as clearly shown in Plaintiff's prior briefs filed with this Court, were either cases with facts wholly distinguishable from the present case, irrelevant cases from jurisdictions other than North Carolina, or North Carolina cases which involved careful weighing of evidence in granting summary judgment motions, not motions to dismiss.

Additionally, the Court of Appeals overlooked the following material facts:

a) In summarily affirming the opinion of the District Court dismissing all Plaintiff's state law tort claims, the Court of Appeals overlooked the fact that Plaintiff's contractual rights which were damaged by Defendants were not those arising from the contract Plaintiff had with Defendant SMH, but rather from Plaintiff's contracts with the surgeons practicing at that hospital, which rights Plaintiff clearly alleges were interfered with by Defendants with malice. The District Court's error concerning this distinction formed the critical, factual basis for its opinion dismissing Plaintiff's tort claims.

b) Plaintiff's right to supervise CRNA's at Defendant SMH's hospital did not derive from her contract with SMH, but were incident to her privileges as a physician with full privileges at SMH. This is why, as noted by the Court, "CRNA's were allowed, however, to work with *all other doctors with staff privileges*" (including persons with *no* anesthesiology skills or training).

c) Plaintiff does not contend that all three Defendants had a right to terminate her contract with SMH. Instead, the Plaintiff contends that SMH alone had the right to terminate such contract, a matter which the remaining two Defendants had no power over or involvement in whatsoever, which fact, in any event, is irrelevant to Plaintiff's complaints against Defendants, as noted in some contexts by the Court.

d) Defendant Davidson had engaged in numerous actions, solely on his own behalf, prior to the remaining Defendants terminating her right to use CRNA's at SMH, which acts were calculated to destroy Plaintiff's practice and to result in her exclusion from SMH and which actions Defendants SMH and GCW *joined in*, outside of peer review, in March, 1991, by precluding Plaintiff, from utilizing SMH's CRNA's in her practice.

e) The Court of Appeals wrongly inferred, without support in the pleadings on which it must rely, that the termination of Plaintiff's right to utilize CRNA's was a "staffing decision," legitimately made by the Defendants and that, for that reason, they thereby acted as agents of the hospital in doing so.

f) The Court of Appeals incorrectly states that "Patel had failed to meet the conditions of her contract. Thus, SMH and its agents *had reasons* to terminate her contract and to restrict her access to hospital resources." [emphases added] In fact, nothing in the pleadings – the sole "source" of facts in ruling on a motion to dismiss under FRCP Rule 12(b)(6) – provides any legitimate business reason for Plaintiff's right to supervise CRNA's to have been terminated as is made (inconsistently) clear by the Court of Appeals' own acknowledgement that *all* other doctors with privileges at SMH were allowed to supervise such CRNA's, notwithstanding their complete lack of anesthesia knowledge, let alone being board-certified anesthesiologists.

g) The court of Appeals relies on demonstrably incorrect findings by the District Court, stating that "*The District Court found* however, that her Complaint was completely void of any allegations as to the effect of the Defendants' actions on competition in the market for anesthesiology services, effect on the prices of anesthesiological services, or effect on the availability of anesthesiology services to the public. . . . " [emphases added]

h) Because under its bylaws only SMH-employed CRNA's were allowed at its hospital, the effect of Defendants' preventing Plaintiff from using SMH's CRNA's in her practice was more than simply "withholding its resources" from her: It precluded her from using *any* CRNA's at that hospital and so destroyed her ability to compete there.

2. Additionally, in counsel's judgment, the Court of Appeals' opinion is in conflict with another opinion of

this Court – *Oksanen v. Page Memorial Hospital*, supra, – and with opinions of other Courts of Appeals – *Brader v. Allegheny General Hospital*, 64 F.3d 869 (3rd Cir. 1995); *Hammes v. Aamco Transmission, Inc.*, 33 F.3d 774 (7th Cir. 1994) – and the conflict is either incorrectly minimized or not addressed at all in the opinion.

STATEMENT OF PURPOSE

The Court of Appeals summarily dismissed Plaintiff's Complaint in this case for the following reasons, made apparent in its unpublished, memorandum, per curiam opinion: The Court concluded that the fact that Plaintiff did not pass a board-certification examination *automatically* rendered any action by the Defendants restricting her actions at SMH's facilities a "legitimate staffing decision", fully justified as a business matter and therefore beyond the purview of the Courts under *any* legal theories, federal or state. This was notwithstanding the Court's acknowledgement that Defendants imposed such restriction on Plaintiff *outside of peer review* and, indeed, *no* peer review committee at SMH ever authorized any restriction on Plaintiff's privileges there, the fact that all other physicians with privileges at that hospital, regardless of their knowledge of anesthesia, were allowed to supervise CRNA's there and regardless of the restrictions on competition in the relevant market such actions resulted in.

The Court of Appeal's characterization of Defendants' complained-of actions as a "staffing decision" begs the critical question: Was it a legitimate, authorized staffing decision? It is apparent that the purpose of that

characterization of Defendants' actions is to reduce the market in which all parties operated (governed by antitrust law) to a single enterprise *for all purposes* – like an employer/employee dispute, presumably beneath the concerns of the antitrust laws. The fact is, however, as noted by this Court in *Oksanen*, that doctors operating within a hospital are not its employees and it is not a single enterprise: the doctors are autonomous professionals exercising autonomous judgment. The hospital provides the essential facilities in which the doctors work but its administration is not *competent* to judge the doctors' abilities. That is precisely the purpose of peer review.

The Court of Appeals states that it is "not convinced" that the intraagency immunity conferred on the medical staff in *Oksanen* requires, as that opinion clearly states, that the staff be acting in its peer review capacity. Consider the effect of this extension of immunity beyond the *Oksanen* court's stated rationale. As noted in that opinion, there are various centers of authority in a hospital. Where a medical staff acts in peer review, the hospital board delegates an entire function to that staff *as a whole* and, in that sense, the staff truly becomes its agent. In addition, to the extent courts might wish to see that actions taken by an entity are based on that entity's best interest, there may be a presumption that professional peer review provides a greater promise of accuracy and validity in the actions it produces.

However, individual doctors, like Defendant Davidson here, *not* acting in peer review, are delegated *no* particular function by the hospital and, absent such express delegation, cannot be deemed automatically to be

its agents. Indeed, any legitimate process governing Plaintiff's privileges at SMH was usurped by the Defendants because their actions occurred outside peer review. Thus, the very policy considerations served by according peer review deference *specifically contemplated* by the *Oksanen* opinion are undermined by exempting the non-peer review actions taken by the Defendants in the present case.

In effect, the Court of Appeals has erected a "staffing decision" exemption from the application of the antitrust laws – or North Carolina tort rules under diversity jurisdiction – when *any* doctor sues *any* hospital, in combination with any person affiliated with it, including its officers or staff physicians, even in circumstances, as alleged in Plaintiff's Complaint, where the individual defendants are acting *against* the interest of the hospital (and so outside their agency) and outside of peer review activity or, as it would be appropriate to infer for purposes of an FRCP 12(b)(6) motion, *in opposition to* peer review decisions made by the acting physicians of the hospital.

In reaching such decision, the Court relies exclusively on the split decision of the Seventh Circuit in *BCB Anesthesia Care v. Passavant Memorial Area Hospital*, 36 F3d 664 (7th Cir. 1994), a case which no other circuit has followed and, as indicated above, was specifically repudiated in *Brader v. Allegheny General Hospital*, 64 F.3d 869 (3rd Cir. 1995), and which, indeed, cannot be reconciled with another decision of the Seventh Circuit – *Hammes v. Aamco Transmissions*, both which latter cases were briefed by Plaintiff but not referred to by the Court of Appeals.

The fact is, there is not even arguably a "staffing decision" exemption from the antitrust laws in any industry outside of health care. The Court of Appeals opinion presumes that hospitals are uniquely protected by the antitrust laws from actions against them by doctors. Is this a way of saying that within the health care profession all vertical restraints are *per se* legal, subject to no rule of reason analysis? This could only be so if the health care industry were unique because in all other industries vertical restraints on competition are indeed subject to antitrust analysis.

In finding such automatic "staffing decision" exception, unsupported by any Supreme Court authority, the Court of Appeals effectively continues a long tradition, described below, in which Courts of Appeals, including this one, have repeatedly attempted to erect automatic barriers to the application of antitrust laws in the health care industry and have been repeatedly, and unanimously, reversed in that regard by the Supreme Court of the United States. This procession of events has occurred at least six times to date.

The first instance in which this occurred was *Goldfarb v. Virginia State Bar Association* 421 U.S. 773, 95 S. Ct. 2004, 44 L.Ed.2d 572 (1975). In *Goldfarb*, prospective legal clients sued the Virginia State Bar Association for price-fixing as a result of its publishing minimum fee schedules for various legal services. This Court dismissed the Plaintiff's claim, holding that although the Bar Association's actions constituted a clear restraint of competition, because the practice of law is not a "trade or commerce" and the Bar Association was a "learned profession"

engaged in state action, it was exempt from the antitrust laws.

A unanimous Supreme Court (with Mr. Justice Powell not participating) overruled this Court, ruling that Sherman Act Section 1 was clearly violated in that case, that the Defendants' actions' effect on interstate commerce was indeed sufficiently substantial even though there was *no* showing that the fee schedule resulted in the raising of fees (Court Syllabus, 421 U.S. at 774, 95 S.Ct. at 2006, and Opinion 421 U.S. at 785-791, 95 S.Ct. At 2002-2014), and that there is *no* automatically-applicable, state action exemption, nor "learned profession" exemption, available to the legal (and, by implication, the medical) profession.

The next antitrust health care "exemption" demolished by the Supreme Court occurred in *Hospital Building Co. v. Trustees of Rex Hospital*, 425 U.S. 738, 96 S.Ct. 1848, 48 L.Ed.2d 338 (1976). In that case, the plaintiff corporation operated a 49-bed proprietary hospital and sued a private, tax-exempt hospital, two of its officers and a health-planning officer, alleging violations of Sherman Act Sections 1 and 2 by defendants for attempting to block the relocation and expansion of plaintiff within Raleigh, North Carolina, for purposes of the defendant hospital monopolizing the Raleigh business. In a unanimous, In Banc decision, this Court (almost exactly as it did in the present case) dismissed the complaint finding that the plaintiff's business was strictly local, with too-incidental and too insubstantial an effect on interstate commerce to rise to the dignity of a Sherman Act claim. The Supreme Court unanimously reversed such decision, thus repudiating what could be called the "interstate

commerce exemption" supposedly unique to the health care industry.

The next health care antitrust "exemption" to be demolished occurred in *National Gerimedical Hospital and Gerontology Center v. Blue Cross of Kansas City,* 452 U.S. 378, 101 S.Ct. 2415, 69 L.Ed2d 89 (1981). In *National Gerimedical,* a private, acute-care hospital in Kansas City, Mo., sought a participating hospital contract with National Blue Cross and its wholly-controlled Missouri subsidiary. Both defendants refused, claiming their internal policies legitimately barred participation by a new hospital, like that plaintiff hospital, which could not show any need for its services. Thus, those defendants, like the Defendants in the present case, claimed merely to have erected a vertical restraint justified by legitimate business reasons.

The Blue Cross defendants specifically relied on the plaintiff's failure to be approved by Mid America Health Systems Agency, a certifying designee under the National Health Planning and Resource Development Act of 1974 (NHPRDA). The plaintiff alleged the actions of the defendants (who, incidentally, would constitute a single entity under the logic of the Court of Appeals and District Court opinions in the present case) constituted a wrongful refusal to deal with it, resulting in a *competitive disadvantage* to it. The defendants alleged that the NHPRDA impliedly repealed the Sherman Act for the conduct in question. The District Court granted summary judgment to the Defendants and the Eighth Circuit affirmed.

The Supreme Court unanimously reversed, holding, once again, that there is nothing unique about the health

care industry and there is no such thing as a health care profession immunity to the Antitrust law.

It is apparent that the ruling of the Court of Appeals in the present case cannot be reconciled with the Supreme Court's ruling in *National Gerimedical*. The Court of appeals appears to have relied on the fact that Plaintiff's privileges were not completely terminated at SMH (which action would have required peer review) and that only certain rights she had there were reduced (the right to use CRNA's) in finding that a mere competitive disadvantage was not a sufficient injury for antitrust purposes. *National Gerimedical* is directly to the contrary. See also *Klors, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S 207, 213, 79 S. Ct. 705, 710, 3L.Ed.2d 741 (1959) (Competitive disadvantage caused by concerted refusal to deal by plaintiff's suppliers – a vertical restraint – sufficient for per se illegality under Sherman Act).

Even more importantly, the underpinnings of the Court of Appeal's "staffing decision" exemption – that *any* claimed excuse for actions by a hospital antitrust defendant is sufficient to immunize its actions from antitrust analysis – cannot be reconciled with the Supreme Court's refusal to find dispositive the *National Gerimedical* Defendants' far more reasonable-sounding justification for its actions, which were supported by actual, legislative authority, unlike the Defendants' actions here. See also *F.T.C. v. Indiana Federation of Dentists*, 476 U.S. 447, 106 S.Ct. 2009, [sic] L.Ed.2d 445 (1986) (no "quality of care" exemption for non-competitive practices for the health care industry, whose markets are inherently local).

The next health care antitrust exception to be demolished occurred in *Arizona v. Maricopa County Medical Society*, 457 U.S. 332, 102 S.Ct. 2466, 73 L.Ed2d 48 (1982). In that case, defendant foundations, by agreement among their member doctors, established maximum fees that those doctors could charge policy holders of specified insurance plans. Although the overall economic effect of this agreement was to *reduce* prices (since *maximum* fees were established), the Supreme Court nevertheless held that the contracts constituted a *per se* illegal, price-fixing agreement under Sherman Act Section 1, thereby ruling, once again, that there is nothing unique about health care economics to make it exempt from the antitrust laws. Moreover, in the present case the Court of Appeals simply adopted the District Court's determination that Plaintiff had failed to state a sufficient antitrust injury because she had failed to show that her exclusion from the relevant market had *raised* prices for anesthesia services. As *Maricopa County Medical Society* makes clear, *no* such showing is required to establish a sufficient antitrust injury.

In *Patrick v. Burget*, 486 U.S. 94, 108 S.Ct. 1658, 100 L.Ed.2d 83 (1988), a plaintiff doctor sued a number of defendant doctors for attempting to destroy his privileges at a hospital in the context of peer review. The district court and the Court of Appeals had ruled that peer review activities were *automatically exempt* from antitrust review, as involving state action, in an analysis somewhat similar to that adopted by this Court in *Oksanen*.[1] Once

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[1] The *Oksanen* Court was able to reach the decision it did by finding an application of the intraenterprise immunity doctrine, a theory the Supreme Court did not discuss in *Patrick*.

again, the Supreme Court unanimously (with Mr. Justice Blackman not participating) repudiated the lower courts and ruled expressly that there is *no* state action immunity for doctors or hospitals engaging in *any* activities (including peer review activities).[2]

It is also submitted that the logic of this Court's "staffing decision" exemption cannot be reconciled with *Patrick v. Burget*. The Court of Appeals' rationale for such exemption is that staffing decisions constitute internal matters (quare: internal to what?) that the courts are correctly unwilling to be involved in. The clear ruling of *Patrick v. Burget* is that even when such decisions occur in the uniquely-protected context of peer review, with all the presumptions of validity supporting actions arising therefrom, and even when such is supported by legislative authority of some kind, that is insufficient to immunize actions against injured parties.

The Complaint in this case shows, on its face, the glaring questionability of the legitimacy of Defendants' stated reason, which the Court of Appeals accepts as automatically valid, for terminating Plaintiff's right to supervise CRNA's – to-wit, that she failed to pass a board-certification examination – inasmuch as it also notes that persons *with no training whatsoever* in anesthesia were permitted to supervise the CRNA's, and no peer

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[2] The specific result in *Patrick v. Burget* was reversed by Congress in passing the Healthcare Quality Improvement Act of 1986, P.L. 99-660, Title IV, §401, 100 Stat. 3784, 42 U.S.C. §§11101 et seq., a statute which, all apparently agree, has no applicability in the present case inasmuch as none of the Defendants nor either of the Courts have mentioned it.

review group even attempted to terminate or reduce Plaintiff's privileges at the hospital (a fact which the Court of Appeals indicates cuts *in favor of* the Defendants, whereas it clearly indicates a lack of any legitimate peer-level concern about Plaintiff's skills and abilities).

Finally, as pointed out by Plaintiff in her briefs in this case, in *Summit Health Ltd. v. Pinhas,* the Supreme Court made clear, contrary to the Court of Appeals, that, indeed, one doctor excluded at one hospital could indeed claim a jurisdictional basis for antitrust claims. As also noted by Plaintiff below, and disregarded by the Court of Appeals in this case, the Seventh Circuit has explicitly ruled in *Hammes v. Aamco Transmissions,* that "one doctor dropped by one hospital" is more than sufficient to state an antitrust injury for Sherman Act Section 1 purposes. 33 F.3d at 781-782. The Court of Appeals failed to mention the inconsistency of its opinion with that of the Seventh Circuit in *Hammes* in this regard and in regard, more generally, to the specificity of pleading requirements the District Court and the Court of Appeals purport to impose in this case. *Hammes,* following *Leatherman v. Tarrant County Narcotics Unit,* ___ U.S. ___ 113 S.Ct. 1160, 122 L.Ed2d 517 (1993), ruled there are no heightened pleading requirements for any cases other than fraud cases under the FRCP. It is submitted that the Court of Appeals' decision in the present case cannot be reconciled with *Hammes* or *Leatherman,* neither of which is mentioned therein.

CONCLUSION

If there is indeed, as the Court of Appeals ruled here, to be a "staffing decision" exemption from the antitrust laws for hospitals and their staff members acting *outside of* peer review, at the very least, such would constitute an extension of all existing authority and any such exemption should be announced by published decision which the profession can comment on, preferably by in banc decision, showing the clear support of this Court for such a proposition. As indicated above, numerous courts of appeals, including this one, in the last twenty years have shown an extraordinary hostility toward antitrust plaintiffs involved in the healthcare industry, repeatedly straining to keep them out of court by erecting one impediment after another to their cases, only to have each such impediment knocked out by a clear ruling of the Supreme Court that there is nothing special about the health care profession when it comes to the antitrust laws. True harm occurs to plaintiffs whose cases are unable ultimately to be granted certiorari by the Supreme Court while awaiting the correction of these unfortunate rulings by the courts of appeals.

For the foregoing reasons, a rehearing is appropriate in this case and such rehearing should be in banc.

Respectfully submitted,

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CERTIFICATE OF MAILING

I hereby certify that on the 22 day of July, 1996, I caused a true and correct copy of the above and foregoing instrument to be deposited in the U.S. Mail, First Class Postage fully prepaid thereon to:

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